(18)

No. 92-1920-CFX
Status: GRANTED

Title: Karen Livadas, Petitioner
v.
Lloyd Aubry, California Labor Commissioner

Docketed:
June 3, 1993

Court: United States Court of Appeals for the Ninth Circuit

See also:
93-81

Counsel for petitioner: McCracken,Richard G., Dannenberg,Bertram R.

Counsel for respondent: Cadell,H. Thomas

9-11-91 9th Cir. op. amended 3-8-93.

Entry	Date	Note	Proceedings and Orders
1	Jun 3 1993	G	Petition for writ of certiorari filed.
2	Jul 1 1993		Brief amicus curiae of Service Employees International Union, AFL-CIO, CLC filed.
3	Jul 7 1993		DISTRIBUTED. September 27, 1993
4	Jul 20 1993	P	Response requested -- JPS. (Due August 20, 1993)
5	Aug 16 1993		Brief of respondent Lloyd Aubry in opposition filed.
6	Aug 24 1993	X	Reply brief of petitioner filed.
7	Oct 4 1993	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Jan 5 1994		REDISTRIBUTED. January 21, 1994 (Page 1)
9	Jan 5 1994	X	Brief amicus curiae of United States filed.
10	Jan 18 1994	X	Supplemental brief of respondent Lloyd Aubry filed.
11	Jan 21 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 4, 1994. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 1, 1994. A reply brief, if any, is to be filed with the Clerk and served upon oposing counsel on or before 3 p.m., Friday, April 15, 1994. Rule 29 does not apply. **********
12	Feb 14 1994	*	Record filed. Original proceedings United States District Court for the Northern District of California.
13	Feb 15 1994	*	Record filed. Partial proceedings United States Court of Appeals for the Ninth Circuit.
14	Mar 2 1994		Brief of petitioner filed.
15	Mar 2 1994		Joint appendix filed.
16	Mar 4 1994		Brief amicus curiae of petitioner Allied Educational Foundation filed.
17	Mar 4 1994		Brief amicus curiae of United States filed.
18	Mar 4 1994		Brief amicus curiae of AFL-CIO filed.
19	Mar 7 1994		SET FOR ARGUMENT TUESDAY, APRIL 26, 1994. (1ST CASE).
20	Mar 8 1994		CIRCULATED.
21	Mar 15 1994		Brief amici curiae of Employers Group, et al. filed.
22	Mar 16 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

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Entry	Date	Note	Proceedings and Orders
24	Mar 23 1994	G	Motion of the Solicitor General to permit Malcolm L. Stewart, Esquire, to present oral argument pro hac vice filed.
23	Mar 24 1994	X	Brief of respondent Lloyd Aubry filed.
27	Apr 1 1994	X	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
25	Apr 4 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
26	Apr 4 1994		Motion of the Solicitor General to permit Malcolm L. Stewart, Esquire, to present oral argument pro hac vice GRANTED.
28	Apr 6 1994	G	Motion of Food Employers Council, Inc. for leave to file a brief as amicus curiae out of time filed.
29	Apr 13 1994	X	Reply brief of petitioner Karen Livadas filed.
30	Apr 18 1994		Motion of Food Employers Council, Inc. for leave to file a brief as amicus curiae out of time GRANTED.
31	Apr 26 1994		ARGUED.

92-1920

No.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

KAREN LIVADAS,
PETITIONER

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE
STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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73 pp

QUESTION PRESENTED

May a state agency refuse to enforce state wage-and-hour law for union workers because they exercise their federally-protected right to bargain collectively, under *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986)?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

KAREN LIVADAS,
PETITIONER,
v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Karen Livadas prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the District Court is reported at 749 F.Supp. 1526 (N.D. Cal. 1990), and is set forth at pages 22a to 50a of the appendix (App. 22a-50a). The decision of the Court of Appeals is reported at 943 F.2d 1140 (9th Cir. 1991). On March 8, 1993, the Court of Appeals filed an order adding a footnote to its earlier opinion and denying Livadas' petition for rehearing. App. 51a-53a. The Court of Appeals' final amended opinion is reprinted at App. 1a-21a.

JURISDICTION

The Court of Appeals filed its amended opinion, along with an order denying Livadas's timely petition for rehearing, on March 8, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in relevant part:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Cal.Lab.Code § 201 provides in relevant part:

> If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

Cal.Lab.Code § 203 provides in relevant part:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days.

Cal.Lab.Code § 229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

STATEMENT OF THE CASE

A. Facts

The California Labor Commissioner, head of the Division of Labor Standards Enforcement (DLSE), is charged with enforcing the state Labor Code on behalf of employees who "are financially unable to employ counsel and . . . have claims which are valid and enforceable." Cal.Lab.Code § 98.3(a). The California Labor Code imposes a number of wage-and-hour regulations on employers in the state; for example, the Labor Code requires employers to give employees their final paycheck immediately on termination, with daily penalties for any delay. Cal.Lab.Code §§ 201 and 203. The policy of the DLSE is to enforce these regulations for all employees except those covered by a collective bargaining agreement with grievance arbitration. App. 25a.

Petitioner Karen Livadas is a grocery clerk. She is a member of Local 373, United Food and Commercial Workers, AFL-CIO.

In January 1990, Livadas tried unsuccessfully to lodge a complaint with the DLSE against her employer for violation of the state Labor Code. Safeway Stores had refused to give Livadas her final paycheck immediately upon termination,

telling her that she would have to wait to receive her final wages by mail. During the following week, Livadas applied to the local office of the DLSE three times to enforce Cal.Lab.Code §§ 201 and 203 against Safeway for its three-day delay in her final wage payment. On January 3 and 8, 1990, DLSE officers told her that the agency could not process her charge, and that she must resolve her complaint through her union or the National Labor Relations Board. App. 24a. On January 9, 1990, Livadas was finally permitted to complete a one-page DLSE "Initial Report." This standardized intake form asks applicants, among other questions, "Was your job union?" Livadas checked the box "Yes."

The Division's only response to Livadas's complaint was a form letter dated February 7, 1990. This letter reiterated that the DLSE does not enforce Labor Code §§ 201 and 203 for employees whose employment is covered by a collective bargaining agreement and grievance arbitration. Because Livadas's job with Safeway Stores was covered by such a union contract, the Division's letter informed her that the agency was closing its file on her complaint. App. 3a. No hearing was ever held on Livadas's Labor Code charge. Safeway Stores was never required to appear or plead defenses to Livadas's complaint.

B. Proceedings Below

Livadas brought this action against the Labor Commissioner under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the DLSE's policy of excluding workers with union contracts from the enforcement of the state Labor Code. Livadas contends that the Commissioner's policy impermissibly penalizes union workers in California for exercising their federal right to organize and bargain collectively, a right protected from state interference by § 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, under *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989) (*Golden State I* and *II*).

The Commissioner argues that his agency excludes workers with union contracts[1] under the compulsion of a 1975 state court injunction, *Plumbing, Heating and Piping Employers Council v. Howard*, 53 Cal.App.3d 828 (1975). The Commissioner justifies this policy disqualifying union workers by citing Cal.Lab.Code § 229, which prohibits the Commissioner from intervening in "any dispute concerning the interpretation or application of any collective bargaining agreement containing . . . an arbitration agreement." On this basis, Livadas and the Commissioner submitted the case on cross-motions for summary judgment.

The District Court (Henderson, J.) granted Livadas's motion for summary judgment. The District Court held that Cal.Lab.Code §§ 201 and 203 are minimum standards of employment that do not require interpretation of a worker's union contract and are therefore not preempted by § 301 of the LMRA, following *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-58 (1985), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-22 (1987) and *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 403-11 (1988). App. 40a-48a. The District Court held that the Commissioner's policy of refusing to enforce these wage-and-hour regulations for union workers imposes an impermissible penalty on their NLRA-protected activity. Following *Golden State I*, the District Court issued a state-wide injunction ordering the Commissioner "to enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause." App. 27a-39a, 49a.

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[1] Strictly speaking, the injunction in *Howard* prohibits enforcement for workers covered by collective bargaining agreements "with an arbitration clause." This is not a meaningful distinction, because virtually all union contracts provide for grievance arbitration. *See Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 411 n.11 (1988). Under federal law, grievance arbitration is "part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 578 (1960).

After an expedited appeal, a divided Ninth Circuit panel reversed. The panel majority (Rymer, J.; Alarcon, J. concurring) declined to decide whether Cal.Lab.Code §§ 201 and 203 are actually preempted by federal labor law. Instead, the Ninth Circuit emphasized that the Commissioner's exclusion policy is based on Cal.Lab.Code § 229, a "perfectly valid" state labor preemption statute. The panel majority reasoned that even if the Commissioner's application of this state statute is wrong, his resulting "erroneous eligibility determination" is, at most, an error of state law for which federal law provides no remedy. App. 12a. The Ninth Circuit acknowledged that, "by virtue of the fact that Livadas is covered by a collective bargaining agreement, she may be more likely to get an erroneous eligibility determination" than non-union workers, but the Court of Appeals reasoned that this result is simply "a function of the complexity of preemption law and the inherent tension between federal and state systems for adjudicating labor disputes." App. 12a-13a. The panel majority concluded: "[W]e believe that Congress would not want state officials erring on the side of adjudicating labor disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a [union contract]." App. 14a.

In dissent, Judge Kozinski protested that anti-union discrimination violates federal rights, whatever the Commissioner's motives. Despite the Commissioner's belief that he is complying with state labor preemption law, the fact remains that "the only employees excluded as a class are those who exercise their federal labor rights." App. 20a. According to Judge Kozinski, "[w]e can't duck the question whether such federal law renders such discrimination impermissible." App. 17a.

Judge Kozinski accused the majority of obscuring this discrimination by "seek[ing] refuge in a novel doctrine of quasi-preemption," under which state officials should refuse

enforcement to union workers "by virtue of certain penumbras and emanations radiating from the body of federal labor law." App. 17a. Judge Kozinski insisted that it is inappropriate for courts "to guess at what Congress 'presumably' would have wanted," and he warned that the majority's divination of "some preemptive corona surrounding the federal labor laws" would nullify this Court's efforts to clarify what is *not* preempted. App. 18a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with decisions of this Court and several other circuits, and raises an important question of federal law that this Court should resolve, in two areas. First, the decision hinders *Machinists* preemption, by allowing local governments to escape a federal remedy just by invoking local labor preemption laws. This new limitation on federal law directly conflicts with decisions of the Fourth and Eighth Circuits. Second, the decision badly damages the uniformity of § 301 preemption doctrine. The Ninth Circuit's new penumbral rule will nullify this Court's recent efforts to resolve this problem, and it conflicts with the First Circuit's treatment of a similar wage-and-hour statute.

1. The Ninth Circuit's decision critically weakens the federal power known as "*Machinists* preemption" under § 7 of the NLRA.[2] According to the Ninth Circuit, union workers have no federal remedy under *Machinists* and *Golden State*, because the Commissioner bases his exclusion policy on Cal.Lab.Code § 229, a "perfectly valid state statute" that duplicates federal law. App. 12a. If the Commissioner's application of this state statute is mistaken, the Ninth Circuit

[2] This doctrine takes its name from *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which held that a state agency could not penalize union activity that Congress intended to be unregulated by the States. In *Golden State I*, this Court extended *Machinists* to rule that a local government may not withhold a benefit under local law because of an applicant's exercise of NLRA rights, 475 U.S. at 619-20; *Golden State II* held that these rights are fully enforceable against government penalty under § 1983. 493 U.S. at 108-13.

reasons, the resulting exclusion of union workers is not a matter of federal concern. App. 12a-13a. As Judge Kozinski bluntly put it, this deferral to a parallel state labor preemption law is "gutting" the protections of *Machinists* and *Golden State* in the Ninth Circuit. App. 21a.

The harm is not just that individual union members like Livadas will go without certain state-law entitlements. The principal effect is that this differential treatment will tend to discourage workers from collective bargaining in the first place. As Judge Kozinski explains, an employer in California may now truthfully warn its employees during a union organizing campaign: "'Look here, if you vote for the union, the first thing that happens to you is that the state Labor Commissioner abandons you.'" App. 21a n.2.

Although Livadas's union may bargain to replace the lost statutory benefits, her employer is under no obligation to agree.[3] Unionized employees in California may have to go on strike to win back the same minimum guarantees that non-union workers in the state enjoy as a matter of statutory right. For lower-wage workers, collective bargaining may not be worth the risk if that choice will cost them the protections of California law.

This is exactly the kind of state-law penalty on the exercise of § 7 rights for which *Machinists* and *Golden State* intend a federal remedy. The Ninth Circuit's refusal to enforce that federal remedy in deference to a state labor preemption law directly conflicts with decisions of the Fourth and Eighth Circuits. In *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, 1152-54 (4th Cir. 1992), the Fourth Circuit rejected an identical attempt to escape a *Golden State* injunction. During a strike at a coal mine, the West Virginia State Police officially declined to arrest picketers trespassing on mine property on the basis of the state's "Neutrality Statute," W. Va. Code § 15-2-13, which forbids state officers to "aid or assist either

[3] As the District Court noted, Livadas's union contract with Safeway Stores does not provide for immediate wage payment on termination or for penalties for late payment. App. 42a.

party . . . in any labor trouble or dispute between employer and employee . . . ." 971 F.2d at 1150-52. The mine owner won a *Golden State* injunction ordering the State Police to enforce its state-law property rights without discrimination. The Fourth Circuit acknowledged that the state Neutrality Statute was facially valid, 971 F.2d at 1154, but held that the state agency's inaction because of its flawed interpretation of that statute interfered with the mine owner's federal right to withstand a strike. *Id.*

The *en banc* Eighth Circuit made the same choice in *Steelworkers v. Johnson*, 830 F.2d 924, 926-29 (8th Cir. 1987) *(en banc)*. A mine closed down during a labor dispute; the South Dakota Department of Labor disqualified all union members from unemployment benefits, but granted benefits to their non-union co-workers on the theory that the latter were involuntarily unemployed, while the former were deemed voluntarily on strike. In federal court, the state agency argued that it was only applying a valid eligibility condition (i.e., that claimants must be involuntarily unemployed) to the facts of particular claimants. The full Eighth Circuit agreed that the state law was "neutral on its face," but ruled that the state agency's "skewed application of its facially neutral test . . . significantly burdens the section 7 right to participate in organized labor." 830 F.2d at 928-29. The *en banc* Eighth Circuit enjoined South Dakota from construing its facially valid eligibility standard to disqualify employees on the basis of their union activity. *Id.*

The Ninth Circuit's decision cannot be reconciled with *Rum Creek Coal Sales* and *Johnson*. If the Ninth Circuit is right, the plaintiffs in those cases had no federal remedy for the "misinterpretation of a perfectly valid state statute." *cf.* App. 12a. The vitality of *Machinists* preemption depends on how this conflict is resolved. If the Ninth Circuit's deferral rule survives, local governments with an interest in organized labor (whether friendly or hostile) will inevitably begin enacting parallel state labor preemption statutes to insulate themselves from a federal remedy.

For example, the City of Los Angeles could enact an ordinance forbidding municipal franchises to be awarded in a way that would "interfere with the balance of power in a labor dispute." So long as the City professed to be interpreting this labor neutrality law on the facts of each employer's application, the City could deny a taxicab franchise to any future employer withstanding a strike. Under these circumstances, the federal courts in the Ninth Circuit would not have the authority to correct the City's mistaken application of its "perfectly valid" local law.

This result cancels *Golden State*. Labor-management conflict will always generate political pressure on local governments to intervene; this is why federal control under *Machinists* and *Golden State* is so necessary for a uniform federal labor policy.

The Ninth Circuit disserves this purpose by introducing a new abstention rule to the law of § 1983. The Ninth Circuit reasons that, if the Commissioner's policy is invalid, a union worker's proper remedy is to seek a traditional writ of mandamus in the California courts. App. 12a. This is a strange exhaustion requirement, considering that Livadas has no right of appeal in the California courts from the Commissioner's refusal to prosecute a Labor Code charge. *See Painting & Drywall Work Preservation Fund v. Aubry*, 206 Cal.App.3d 682, 684-87 (1988). The Commissioner cannot label his exclusion of Livadas as some type of unappealable adjudication of rights: Livadas was automatically disqualified, and her employer never had to appear or plead defenses in any adversary proceeding.

Taken to its logical conclusion, the Ninth Circuit's abstention in favor of the state courts' mandamus power would abolish the § 1983 injunction altogether, because the catch-all remedy of traditional mandamus is always available to compel a state actor to obey any law, state or federal. For instance, the taxicab company in *Golden State* could easily have petitioned for mandamus in the California courts to review the

City's denial of its municipal license.[4] Since *Patsy v. Board of Regents*, 457 U.S. 496 (1982), however, § 1983 plaintiffs have not been required to exhaust their state-law remedies, because § 1983 was enacted to guarantee a federal forum for the protection of federal rights.

The Ninth Circuit's deferral rule allows local governments who find *Machinists* preemption inconvenient to avoid a federal injunction just by adjusting their litigation tactics. This Court should grant certiorari to ensure that federal labor law is not circumvented this easily.

2. The Ninth Circuit's decision will also splinter the uniformity of preemption law under § 301 of the LMRA. The damage in this case is not that a court has mistakenly ruled that two minor California regulations are in fact preempted. The damage is that the Ninth Circuit refuses to answer this question of federal law at all, and devises instead a rule of thumb for state agencies to resolve all doubts about the meaning of the law against union workers. The Ninth Circuit suggests that federal labor preemption is inherently ambiguous, App. 13a, and so authorizes state officials to refuse enforcement to union workers "whenever it is a close call as to whether a claim would be preempted," or whenever "a claim even arguably is intertwined with consideration" of a union contract. App. at 14a.

As Judge Kozinski warns, this "novel doctrine of quasi-preemption" will nullify this Court's efforts to clarify what is *not* preempted. App. 17a-18a. Since 1985, this Court has repeatedly answered these doubts by holding that workers covered by union contracts are fully entitled to the benefits of minimum state labor standards, in *Metropolitan Life*, *Fort Halifax Packing*, and *Lingle*.

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[4] The California courts have the power of administrative mandamus over local governments' decisions on applications for municipal franchises and licenses. *See Sierra Club v. City of Hayward*, 28 Cal.3d 840, 848-49 (1981).

Despite this authority, the lower courts have continued to struggle with the idea that union workers have state-law employment rights. An earlier Ninth Circuit panel frankly described § 301 preemption after *Lingle* as a "thicket," a "tangled and confused interplay between federal and state law," and "one of the most confused areas of federal court litigation."[5] The Supreme Court of Washington recently lamented that "courts are still struggling to ascertain when a claim's resolution actually *will* involve interpretation or consideration of the [collective bargaining agreement], and section 301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*."[6]

The Ninth Circuit's new preemption rule will make the prevailing uncertainty over § 301 preemption much worse, because this is the first federal appellate decision to endorse that uncertainty as an integral element of preemption law. Reasonable minds have always differed over the "arguable" nuances of the law affecting collective bargaining—this is exactly why a unified federal labor doctrine is so necessary. *See Teamsters v. Lucas Flour*, 369 U.S. 95, 103-04 (1962). If pro-union and anti-union state agencies apply different preemption rules to collective bargaining, "the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to [union contracts]" in the first place. *Id.* at 104.

The Ninth Circuit's penumbral preemption standard is especially damaging because it is applied here to a wage-and-hour regulation that is clearly not preempted. As the District Court and Judge Kozinski point out, the question of whether Livadas's employer violated Cal.Lab.Code § 201 can be determined simply by looking at a calendar, not at the union contract. App. at 19a-20a; 41a. The Commissioner's objection

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[5] *Galvez v. Kuhn*, 933 F.2d 773, 774, 776 (9th Cir. 1991), quoting Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 209 (1989).

[6] *Commodore v. University Mechanical Contractors*, 120 Wash.2d 120, 129, 839 P.2d 314, 318 (1992) (emphasis in original).

that he will have to calculate Livadas's § 203 penalties from the wage rate in her union contract is answered by *Lingle*, 486 U.S. at 413 n.12. The First Circuit holds that a similar Maine wage-and-hour statute prohibiting wage deductions from payroll checks is not preempted by § 301 of the LMRA. *Beckwith v. United Parcel Service*, 889 F.2d 344, 346-49 (1st Cir. 1989). If, contrary to the First Circuit, state wage-and-hour laws like these present such a "close call" that state officials should disqualify union workers, it is hard to see how any preemption question could ever be clear enough to satisfy state officials' doubts.

The Ninth Circuit promotes this kind of doctrinal mischief when it declares that state officials will be protecting the grievance-arbitration process by resolving doubts against union workers. Unfortunately for a union worker like Livadas, this "benefit of the doubt" preemption rule would vanish the moment she tried to enforce the state Labor Code through a contract grievance. Labor arbitrators may only enforce rights arising under the union contract, not under external law. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974). In the event that an arbitrator did try to award a remedy for Livadas's complaint under Cal.Lab.Code §§ 201 and 203, the award would be swiftly vacated in federal court as outside the arbitrator's authority. *See Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960). By disqualifying union workers from Labor Code enforcement, the Commissioner is not protecting the arbitration of contractual grievances; he is penalizing workers for negotiating union contracts in the first place.

This Court will have to revisit this question soon to preserve the uniformity of § 301 preemption law. Unfortunately, the preemption controversy usually arises from state-court judicial proceedings, where the issue is limited to a single plaintiff's claim under a specific state law. By contrast, this

lawsuit has attracted unusual attention from legal scholars,[7] multi-employer associations,[8] and the courts below, because it attacks a state-wide bureaucratic policy of excluding union workers without any individual adversary proceedings. The Ninth Circuit's reversal of the District Court's state-wide injunction affected the rights of all union members in California, and established a penumbral preemption rule that now governs all state employment laws in the Circuit. This is an unusually significant case, one that this Court should decide to clear up the lower courts' uncertainty.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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[7] Two academic commentators have already strongly criticized the Ninth Circuit's decision in this case and applauded Judge Kozinski's dissent. See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 618-20 (1992); Note, *The Golden State of Labor Preemption: The Circuit Courts Have Gone Too Far*, 44 Hastings L. J. 131, 156-58 (1992).

[8] Two state-wide employers' associations filed extensive *amicus curiae* briefs in support of the Commissioner in the Court of Appeals: the Food Employers Council, and the employer trustees of the Carpenter Employers Contract Administration Trust Fund.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16650
D.C. No. CV-90-0468-TEH

KAREN LIVADAS,
PLAINTIFF-APPELLEE

v.

LLOYD AUBRY,
IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA
DEFENDANT-APPELLANT

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THELTON E. HENDERSON, District Judge, Presiding

Argued and Submitted
May 13, 1991—San Francisco, California

Filed September 11, 1991
Amended March 8, 1993

Before: Arthur L. Alarcon, Alex Kozinski and
Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer;
Dissent by Judge Kozinski

OPINION

RYMER, Circuit Judge:

Karen Livadas brought this action under 42 U.S.C. § 1983 against Lloyd Aubry, the Labor Commissioner of California (Commissioner). She argues that the Commissioner deprived her of her right under the National Labor Relations Act (NLRA) to bargain collectively because he denied her enforcement of certain sections of the California Labor Code based on his determination that adjudicating her dispute would concern the interpretation or application of a collective bargaining agreement containing an arbitration clause. The district court granted Livadas's motion for summary judgment. We reverse.

I

Livadas was terminated from her job at Safeway on January 2, 1990. On that day, she requested all pay due her. The store manager refused, saying that he did not have payroll records at the store and that he would instead mail her a check. Livadas received the check on January 5, 1990.

Livadas does not dispute the amount of the check, but she contends that Safeway's three-day delay in payment violated California law. California Labor Code § 201 provides: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Section 203 provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Section[ ]201 . . ., any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid." Based on these statutes, Livadas claims that Safeway owes her penalty payments for the three days her check was delayed.

On January 9, 1990, Livadas filed a claim for the penalties with the California Division of Labor Standards Enforcement

(DLSE). The Commissioner heads the DLSE. He may prosecute actions to collect penalties for persons who, in his judgment, "are financially unable to employ counsel and . . . have claims which are valid and enforceable." Cal. Lab. Code § 98.3(a).

In a letter dated February 7, 1990, the DLSE informed Livadas that it could not proceed with her claim because California Labor Code § 229 precludes the DLSE from adjudicating "any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause." The letter explained that it was the DLSE's understanding that Livadas was covered by a collective bargaining agreement containing an arbitration clause. Because § 203 requires that wages continue at the "same rate," and the collective bargaining agreement established Livadas's rate of pay, the DLSE concluded that prosecuting Livadas's claim would require applying the collective bargaining agreement.

On February 16, 1990, Livadas filed a complaint in the district court under 42 U.S.C. § 1983 against Lloyd Aubry in his official capacity as Labor Commissioner, seeking injunctive and declaratory relief and damages based on his refusal to prosecute her claim. She alleged that the Commissioner's policy of not enforcing § 203 claims for employees who worked under collective bargaining agreements denied her the benefit of his enforcement powers on the sole basis that she was a union member covered by a collective bargaining agreement. Such a policy, she contended, interfered with her right under the NLRA to bargain collectively.

Both parties moved for summary judgment. The district judge initially denied both motions, concluding that there were genuine issues of material fact. Livadas made a motion for reconsideration, which the district court granted. Upon reconsideration, the district court granted Livadas's motion for summary judgment, concluding that § 1983 provided

Livadas with a cause of action and that the Commissioner's policy deprived Livadas of her right to bargain collectively. The Commissioner appeals.

II

The threshold issue in this case is whether Livadas has asserted the sort of violation that is actionable under § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court has interpreted § 1983 to provide a cause of action for a deprivation of rights granted by the NLRA. In *Golden State Transit Corp. v. City of Los Angeles, (Golden State II)*, 493 U.S. 103, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989), the Court held that an employer could bring an action under § 1983 based on a city's interference with the collective bargaining process. In that case, the city had conditioned renewal of the employer's taxicab franchise on its settling a strike. The Court had held in an earlier appeal that the city's action interfered with and was therefore preempted by the NLRA because an employer's withstanding a strike is conduct that Congress intended to be left unregulated either by it or by the states. *Golden State Transit Corp. v. City of Los Angeles, (Golden State I)*, 475 U.S. 608, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986).

In *Golden State II*, the Court applied a two-part test to determine whether the city's violation was actionable under § 1983:

> First, the plaintiff must assert the violation of a federal right. . . . In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." . . . We have also asked whether the provision in question was "inten[ded] to benefit" the putative plaintiff.
>
> Second, even when a plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under § 1983," by providing a "comprehensive enforcement mechanis[m] for protection of a federal right."

107 L. Ed. 2d at 427-28 (citations omitted).

The Court concluded that the second prong was satisfied because, while Congress has created a comprehensive scheme to prevent unfair labor practices by employers and unions (through the creation of the NLRB), it has not provided any mechanism to address governmental interference with rights protected by the NLRA. *Id.* at 429. The Court went on to conclude that the first prong was also satisfied because the NLRA implicitly protects an employer's right to use permissible economic weapons free from governmental interference. *Id.* at 430-32.

Golden State II's resolution of the second prong applies with equal force in this case. The NLRB has no power to address the Commissioner's alleged interference with Livadas's NLRA rights. Thus, a § 1983 suit is not precluded on this ground.

The parties' dispute on this issue centers on whether Livadas has asserted a "right" that is protected by the NLRA against governmental interference. Livadas contends that the NLRA grants her a right, as an employee, to bargain collectively.

The plain language of the NLRA supports Livadas's position. Section 7, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . .

Similarly, the NLRA declares it to be the policy of the United States to

> eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

The Supreme Court in *Golden State II* also seemed to assume that the NLRA establishes a right to bargain collectively. It reasoned that "[t]he rights protected against state interference . . . are not *limited* to those explicitly set forth in § 7 as protected against private interference." 107 L. Ed. 2d at 430 (emphasis added). It concluded that the employer was "the intended beneficiary of a statutory scheme that prevents governmental interference with the *collective-bargaining process*." *Id.* (emphasis added). The right in *Golden State* to be free from interference in the collective bargaining process would be meaningless if parties had no right to engage in collective bargaining in the first place.

The Commissioner acknowledges this right to bargain collectively, but he contends that the right to bargain belongs only to the union, not to an individual employee. But the NLRA speaks in terms of the rights of employees, not unions. The Commissioner's interpretation that it only gives unions the right to bargain collectively does not comport with § 7's language that *employees* have the right "to bargain collectively *through* representatives." 29 U.S.C. § 157 (emphasis added).

Moreover, the Supreme Court has interpreted § 7 to apply to acts by individual employees, not just to acts by unions. In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984), the Court held that an employee's assertion of a right under his CBA was "concerted activity" for purposes of § 7, such that his discharge based on it constituted an unfair labor practice. In reaching its conclusion, the Court explained that an individual's acts in joining and assisting a labor organization are protected under § 7, noting that "Congress viewed each employee as engaged in concerted activity." *Id.* at 833.

The Commissioner cites *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S. Ct. 977, 43 L. Ed. 2d 12 (1975), in support of his position that Livadas has no individual right to bargain collectively. There, a group of minority employees contended that they had a right, under § 7, to bargain with their employer without the assistance of their union. The Court held that they did not because § 7 only protects the right to bargain through elected representatives, that is, to bargain collectively, and it does not protect the right to bargain separately.

Emporium Capwell has no application here. Livadas does not assert that she has a right to bargain independently of her union. Indeed, the whole dispute arose in this case because she was covered by a *collective* bargaining agreement. The right she asserts is simply to be allowed to participate in her union's collective bargaining activity.

We conclude that Livadas has a cause of action under § 1983. Federal law gives her a right to engage in collective bargaining, and § 1983 therefore provides a remedy for a deprivation of that right.

III

Turning to the merits, we must decide whether the Commissioner has in fact deprived Livadas of her right under the NLRA to bargain collectively. The Commissioner's policy is

not to adjudicate any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause. Livadas does not object to this policy because she concedes that the Commissioner's enforcement under those circumstances would be preempted by federal labor law. Rather, she claims that the Commissioner applied the policy incorrectly in this case because, she contends, California Labor Code §§ 201 and 203 provide independent state rights and do not concern the interpretation or application of collective bargaining agreements. For that reason, she asserts that her claim in fact would not be preempted by federal labor law. She argues that by misapplying the policy in her case and going beyond federal preemption principles, the Commissioner has deprived her of her right to bargain collectively.

A. *The Commissioner's policy*

The Commissioner explained fully his reason for denying Livadas enforcement of her claim in the DLSE's letter of February 7, 1990:

> It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.
>
> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

The Commissioner thus made clear that his policy is not to enforce any claim that concerns the interpretation or application of any collective bargaining agreement containing an arbitration clause, pursuant to California Labor Code § 229. He

then interpreted § 229 to preclude enforcement in Livadas's case because deciding her § 203 claim would require applying her collective bargaining agreement, which contains an arbitration clause.

The Commissioner's statement of his policy is entirely consistent with the provisions of Labor Code § 229, which states:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

The California courts have interpreted § 229 as "prohibit[ing] the Labor Commissioner from assuming jurisdiction to enforce claims for wages arising under collective bargaining agreements." *Plumbing, Heating & Piping Employers Council v. Howard*, 53 Cal. App. 3d 828, 834-35, 126 Cal. Rptr. 406, 410 (1975).

The Commissioner points out that § 229 is intended to reflect principles of federal preemption in the area of labor relations. The court in *Howard* explained that the aim of § 229 is to "recognize the importance of both collective bargaining agreements and arbitration," *id.* at 833, and to maintain the primacy of federal labor law. *Id.* at 833-35; *see also Bechtel Constr., Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220, 1223 (9th Cir. 1987). Similar to California's rule, the Supreme Court has held that state law claims are preempted if they are "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). We therefore understand § 229 to preclude the adjudication of claims that would be preempted by federal labor law.

The Commissioner's policy of not enforcing claims that concern the interpretation or application of collective bargaining agreements containing arbitration clauses is thus based on the idea that such enforcement would be preempted by federal law.

B. *Deprivation of Livadas's NLRA right*

We do not believe that the Commissioner's denial of enforcement on the basis that Livadas's claim would concern the interpretation or application of a collective bargaining agreement deprived Livadas of her right to bargain collectively; indeed, we do not believe it implicated her federal rights at all. Livadas does not object to the rule stated in § 229 and *Howard* because she recognizes that it reflects principles of federal preemption. She further recognizes that she could not have a right to the Commissioner's enforcement if that enforcement were preempted because, of course, she does not have the right to compel the Commissioner to do that which federal law does not permit him to do. Livadas's objection is rather that the Commissioner misinterpreted the rule because she claims that in fact her § 203 claim would not be preempted by federal labor law. We need not reach the question of whether the Commissioner incorrectly determined that her § 203 claim was preempted because, even if he did, Livadas has not established a deprivation of her right to bargain collectively.

Livadas relies on *Golden State I* and *II* to support her argument that the Commissioner may not condition his enforcement on her not having worked under a collective bargaining agreement. *Golden State* makes clear that the denial of a benefit in some cases can be sufficient to constitute an infringement. There, the city had conditioned a franchise renewal on the employer's settlement of a strike. Even though the franchise renewal was a privilege, not a right, the Court held that conditioning its conferral on relinquishment of the employer's federally protected right to withstand the strike impermissibly infringed that right. *See also Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988), ("government

may not condition the conferral of a benefit on the relinquishment of a constitutional right"). Thus, Livadas correctly states the law when she states that conditioning a benefit on the relinquishment of a federal right can infringe that right.

But Livadas's general statement of the law does not dispose of this case. There is a fundamental difference between this case and *Golden State*. In *Golden State*, the city's condition itself was impermissible. The city demanded that the taxicab company settle its strike as a condition for renewing its franchise. The city's condition on the conferral of its benefit was that the employer not exercise its federally protected right to withstand a strike.

Here, the Commissioner's condition is *not* that Livadas not exercise her right to bargain collectively. It is that enforcement not require the interpretation or application of a collective bargaining agreement. That condition is perfectly permissible under federal law. In fact, it is required under federal law, for if adjudicating the dispute would require interpreting a collective bargaining agreement, federal law would preempt the adjudication. Livadas does not contest this point, and she therefore does not challenge the condition itself.

Rather, she challenges the application of the rule to her case. She claims that the Commissioner erred in deciding that her claim was preempted. This argument would be equivalent to the employer in *Golden State* arguing that the city deprived it of its federal rights because the employer had in fact settled the strike. That argument clearly would have failed because the determination of whether or not the employer had complied with the city's condition is simply a question of interpreting the city's condition and does not implicate federal rights.

Similarly here, because Livadas does not challenge the condition the Commissioner places on his enforcement but only his interpretation that the condition has not been satisfied, she has not demonstrated any deprivation of her federal

rights. Simply because the Commissioner (arguably) erroneously determined that her claim would be preempted does not invalidate the condition he placed on his enforcement. It does not change the fact that he has conditioned his enforcement on his determining that the claim would not be preempted by federal labor law. And it does not change the fact that his condition is perfectly permissible, indeed required, under federal law.

Livadas is left, then, with the simple claim that the Commissioner erroneously interpreted his own policy. That amounts only to a state law claim that she is in fact eligible for the Commissioner's enforcement under California Labor Code § 229. The appropriate relief would be a writ of mandate from the California courts, see *Baker v. Aubry*, 216 Cal. App. 3d 1259, 265 Cal. Rptr. 381 (1989), *review denied*, Mar. 15, 1990, *cert. denied*, 111 S. Ct. 66 (1990), and she could seek such relief on the ground that the Commissioner misinterpreted § 229. A misinterpretation of a perfectly valid state statute, however, does not provide grounds for federal relief.

To hold that Livadas is entitled to federal relief in this case would require us to hold that she is entitled under the NLRA to a correct interpretation of California law regarding enforcement of § 203 claims. We cannot so hold. Livadas is in the same position as every other employee in the state when it comes to seeking the Commissioner's enforcement. Every employee who seeks enforcement is subject to an eligibility determination, and every employee who seeks enforcement is subject to the risk that the Commissioner will get it wrong. If the Commissioner gets it wrong, the employee (whether or not she worked under a collective bargaining agreement) can seek a writ of mandate to correct the error. Thus, we do not see how the Commissioner, simply by making an erroneous eligibility determination, has penalized Livadas for the exercise of her right to bargain collectively because he has treated her exactly the same as every other employee in the state.

Of course, by virtue of the fact that Livadas is covered by a collective bargaining agreement, she may be more likely to

get an erroneous eligibility determination than employees who do not work under collective bargaining agreements because the Commissioner is more likely to hold that her claim is preempted by federal labor law.[1] But that is a function of the condition placed on enforcement that the claim not be preempted—a condition to which she does not object and could not object. It is also perhaps a function of the complexity of preemption law and of the inherent tension between federal and state systems for adjudicating labor disputes. It is *not* a function of the Commissioner's placing any kind of impermissible condition on the benefit of his enforcement.

We cannot believe that Congress intended in granting a right to bargain collectively to give employees who choose to do so the right to have a state official correctly interpret the state's own law. That would place employees who bargain collectively in a better position than those who do not because it gives them an extra avenue of redress for the erroneous determination of state law. Because § 7 of the NLRA gives employees the right to *refrain* from bargaining collectively as well as the right to do so, 29 U.S.C. § 157, we do not believe that Congress could have intended to confer extra rights on employees who choose to bargain collectively. At least without an express direction from Congress that it so intended, we will not read the right to bargain collectively to include such an extraordinary right.

Finally, we are also persuaded by the more general policies of federal labor law that Congress did not intend to protect workers from an erroneous determination that their state law claims are preempted by federal labor law. Congress intended to create a uniform body of federal law for labor disputes arising under collective bargaining agreements. To that end, it created a comprehensive scheme for adjudicating such disputes. *See generally* 29 U.S.C. § 185 (Labor Management

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[1] Presumably, the only way an employee who does not work under a collective bargaining agreement could get this same determination is if the Comissioner makes an erroneous *factual* determination that the employee did work under a collective bargaining agreement.

Relations Act § 301); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101-05, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962). Congress also intended that arbitration would be central to the resolution of disputes arising under collective bargaining agreements. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

Given the primacy of the federal scheme for handling labor disputes, we believe that Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause.

In essence, we think Livadas is claiming that the Commissioner wrongly decided that she was not eligible for enforcement. Because she does not challenge the criterion he used for determining her eligibility (that her claim not be preempted), her claim boils down to a claim that he interpreted his own rule incorrectly. We believe this claim would only establish an error under California law (that she was in fact entitled to enforcement) and not a deprivation of her federal right. We see no way in which an erroneous determination of eligibility for the Commissioner's enforcement under California law can be transformed into a deprivation of a federal right. Therefore, we conclude that Livadas has failed to show that the Commissioner deprived her of her right to bargain collectively under the NLRA, and the district court improperly granted summary judgment in her favor.[2]

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[2] We recently held in *Barnes v. Stone Container Corp.*, 942 F.2d 689 (9th Cir. 1991), that imposition of a just cause term by the Montana Wrongful Discharge Act, which excepted employees covered by a collective bargaining agreement, on parties who were in the process of negotiating a new collective bargaining agreement, interferes with the collective bargaining process and is therefore preempted by the NLRA under *International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Unlike this case, *Barnes* was a private action between employee and employer where the issue was whether the employee could permissibly pursue a state law claim without running afoul of *Machinists* preemption even though he was not then covered by a collective bargaining agreement. Here, there is no dispute that Livadas is covered by a collective bargaining agreement with an arbitration clause that is normally subject to federal preemption. Nor is there any contention that California Labor Code § 229 incorrectly incorporates preemption principles or is inapplicable to the Commissioner's decision whether to prosecute Livadas's claim against Safeway. Accordingly, Livadas's case is not *Golden State*, where the city's condition itself was impermissible, *Barnes*, where the state's preemption provision was inapplicable, or *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, 1152-54 (4th Cir. 1992), where the state's excepting labor disputes from its trespass law cut too broad a preemption path.

REVERSED and REMANDED, with instructions to enter judgment in favor of the defendant-appellant, Lloyd Aubry.

KOZINSKI, Circuit Judge, dissenting:

According to my colleagues, the question presented to us is whether Karen Livadas was entitled to a correct interpretation of state law. See Majority at 2000 [App. 12a]. The answer to this question is clearly no. The answer is much different, however, if one asks the right question: May Karen Livadas be denied state-law benefits just because she is covered by a collective bargaining agreement? It is our responsibility to answer the question fairly presented to us by the litigants, not one we might prefer they had asked. Because the majority comes up with the right answer to the wrong question, I must dissent.

I

A. What happened here is fairly simple: Karen Livadas lost her job at Safeway and the employer did not send her her final paycheck until three days later. This is not a big deal, but under California law an employee is entitled to her paycheck on the date of departure; the law provides a penalty for any delay. Cal. Labor Code §§ 201 & 203. To ensure that impecunious employees are not denied their statutory rights, the state Labor Commissioner—the defendant here—is charged with enforcing such claims on behalf of employees who have valid claims and who are financially unable to employ an attorney. *Id.* § 98.3(a).

The Commissioner does have a good bit of discretion whether to press a particular employee's claim. For example, it is the Commissioner who must determine under what circumstances an employee is deemed financially unable to employ counsel. The Commissioner must also resolve an important question of state law: Does the employee have a valid claim? Had the Commissioner refused to enforce Livadas's claim for either of these reasons, this would have been purely a matter of state law and not the proper subject of a federal action.

But the Commissioner did not refuse to press Livadas's claim on either of these grounds. Instead, he refused to litigate on her behalf because she is covered by a collective bargaining agreement. In so doing, the Commissioner treated employees who are covered by a CBA in a different—and less favorable—manner than all other employees. This is clearly discrimination based on an exercise of protected federal rights. Whether such discrimination is permissible is a question of federal, not state, law.

The majority is distracted by the fact that the Commissioner's policy is based on his interpretation of section 229 of the California Labor Code, which precludes the Commissioner from getting involved in disputes calling for an interpretation of a CBA. The Commissioner construes this section as prohibiting enforcement of Livadas's claim. But surely it doesn't matter *why* the Commissioner engages in invidious discrimination. Were the Commissioner to interpret state law as authorizing the enforcement of section 201 claims only on behalf of whites, would his decision be insulated from federal scrutiny? The point is, the Commissioner is applying state law and his own policy in a way that impinges on protected federal rights. We can't duck the question whether federal law renders such discrimination impermissible.

B. Recognizing perhaps that state law cannot carry the day, the majority seeks refuge in a novel doctrine of quasi-preemption. Assuming, the majority says, that the Commissioner's enforcement of section 201 would not be preempted by federal law,[1] the Commissioner is nevertheless justified in staying his hand by virtue of certain penumbras and emanations radiating from the body of federal labor law: "Given the primacy of the federal scheme for handling labor disputes, we believe that Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials

[1] This is more than a reasonable assumption; it's a fact. See below at II.A.

to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." Majority at 2002-03. [App. 14a]

This rationale is remarkable for more reasons than one. To begin with, our function is to apply the laws Congress has written, not to guess what Congress "presumably" would have wanted as to matters about which it did not legislate. Further, the theory of quasi-preemption the majority adopts is strikingly similar to the theory of preemption considered and rejected by the Supreme Court and by our court. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n. 28 (1983) ("we have never intimated that any action merely relating to a contract within the coverage of [LMRA] § 301 arises exclusively under that section"); *Miller v. AT&T Network Systems*, 850 F.2d 543, 546-47 (9th Cir. 1988). To the extent my colleagues are divining some preemptive corona surrounding the federal labor laws, it surely cannot include that which the Supreme Court has said is *not* preempted.

The question of preemption is, of course, significant. To the extent the Commissioner's enforcement of section 201 of the California Labor Code conflicts with federal labor law, the Commissioner is without authority to act. But once we step outside the arena of actual preemption, federal law imposes no obligation on the Commissioner to refrain from acting. And his refusal to act simply because the employee is covered by a CBA raises a serious question of anti-union discrimination. The majority's attempt to find safety between the pendulum of preemption and the pit of unlawful discrimination is simply unavailing.

II

The issue presented to us is really very simple: Is the relief Livadas seeks in fact preempted by the federal labor laws? And if not, is the Commissioner acting unlawfully in refusing to enforce Livadas's claim because she is covered by a CBA?

A. The first question has an easy answer: No. State-law claims are preempted by federal labor law if they are "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985). We have interpreted this language to require federal preemption of state-law causes of action for violating a CBA, founded on rights created by a CBA, or substantially dependent on or governed by the terms of a CBA. See *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 861 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988). On the other hand, there is no incompatibility "between federal rules designed to restore the equality of bargaining power, and state . . . legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985). In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Supreme Court held that state-law claims are "independent" of the CBA and therefore not preempted where "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 407.

In *Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991), we interpreted *Lingle* and held that an employee's claim for assault and battery based on unsafe working conditions was not preempted, even though there were provisions in the CBA that governed the work environment. Because the employee's claim "alleg[ed] violation of a duty owed to all citizens," the state-law claim could be decided without reference to the CBA. *Id.* at 777 (emphasis added); see also *Operating Engineers Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1990) (state-law action for fraud in the inducement not preempted because independent of rights under CBA).

Livadas's claim against Safeway is grounded only in state law: A court could find that the employer did not pay her immediately upon termination—and thus violated the statute—without ever looking at the CBA. The Commissioner's

argument that enforcement of section 201 requires an application of the CBA because he will have to consult the contract to determine Livadas's wage rate is answered by the Supreme Court in *Lingle:* "A collective-bargaining agreement may, of course, contain information *such as rate of pay* and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. . . . In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted." 486 U.S. at 413 n. 12 (emphasis added).

B. The second question is somewhat closer. The Commissioner seems to be badly mistaken about the scope of federal labor law preemption—honestly mistaken, but mistaken nonetheless. That the Commissioner's policy is based on an honest (though flagrant) mistake of law does not save it from invalidity. He is a state official administering a state program in a way that arguably burdens the right of employees to participate in collective bargaining. Where, as here, the policy treats individuals differently based on the exercise of a federally protected right, we must look at the effects of the policy, not merely its purposes.

The effect of the Commissioner's policy is not earthshaking, but neither is it insignificant. It denies employees who are covered by a CBA the right to have their state labor law claims pressed by the state Labor Commissioner free of charge. What this means is that impecunious employees who serve at will, pursuant to individual contracts and those who are covered by implied contracts are all entitled to the services of a state official; the only employees excluded as a class are those who exercise their federal labor rights. As the district court noted, "[t]he parties agree that the defendant provides certain valuable protections and benefits to all California employees except those who work under collective bargaining agreements." *Livadas v. Aubry*, 749 F. Supp. 1526, 1528 (N.D. Cal. 1990). I find it hard to conclude that

denying a valuable benefit to employees simply because they are covered by a CBA does not burden the exercise of rights protected by the NLRA.[2]

I might nevertheless conclude that this burden on the collective bargaining process is permissible if it served some legitimate state purpose, but we know it doesn't. I have difficulty approving even a slight burden on a federally protected right when the *only* justification offered is the Commissioner's mistaken understanding of federal preemption law. Federal preemption is our bailiwick, not the Commissioner's, and if he is confused on this score, it's our job to set him straight. Because he offers not the slightest state-law based justification for his policy, I cannot see my way clear to approving it.

CONCLUSION

While I agree with the majority that Livadas has a right enforceable in federal court, I cannot join my colleagues in gutting that right and improperly deferring to the Commissioner. I therefore respectfully dissent.

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[2] Aside from the effects on individual employees, the Commissioner's policy may have an effect on the collective bargaining process itself. It is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: "Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you." In a closely fought election, this type of argument might make a difference.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-90-0468 TEH

KAREN LIVADAS,
PLAINTIFF

v.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER OF CALIFORNIA,
DEFENDANT

[Filed: October 12, 1990]

MEMORANDUM OPINION AND ORDER

THELTON E. HENDERSON, District Judge:

This matter comes before the Court on the plaintiff's motion for summary judgement and the defendant's countermotion for summary judgement. The plaintiff moves for summary judgement on the ground that the defendant's policy, denying enforcement of certain provisions of the California Labor Code to Plaintiff on the basis of her coverage under a collective-bargaining agreement with an arbitration clause, constitutes state action which infringes upon her federal rights under the National Labor Relations Act (NLRA), in violation of 42 U.S.C. § 1983. The plaintiff alleges that the policy denies her certain valuable benefits, which are granted to all employees except those whose employment is governed by a collective bargaining agreement containing an arbitration clause, and that the policy discourages collective bargaining, which is a federal right granted to all employees in the NLRA.

The defendant, in a countermotion for summary judgement, alleges that, rather than interfering with the plaintiff's rights under federal law, the state's policy actually encourages collective bargaining and arbitration, and that furthermore, federal preemption doctrine prevents the defendant from providing the contested benefits to the plaintiff.

The parties' motions for summary judgement came on for hearing on September 24, 1990 at 10:00 a.m., the Honorable Thelton E. Henderson presiding. The plaintiff was represented by Davis, Cowell, & Bowe and Michael T. Anderson. The defendant was represented by H. Thomas Cadell, Jr., Chief Counsel, Division of Labor Standards Enforcement. The Court would like to thank the parties, and especially Mr. Anderson, for their excellent work in briefing the very difficult issues presented in these motions. After careful consideration of the parties' written and oral arguments, it appears to the satisfaction of the Court therefrom that the plaintiff's

motion for summary judgement should be GRANTED and that the defendant's motion for summary judgement should be DENIED.

BACKGROUND

The plaintiff, Karen Livadas, is a member of United Food and Commercial Workers, Local 373, AFL-CIO ("Local 373"). Ms. Livadas worked at Safeway Stores ("Safeway") in Napa County, California until January 2, 1990, when she was notified through her union that she had been terminated from the job. Ms. Livadas alleges that on the day she was terminated she requested all pay due her. The store manager informed Ms. Livadas that Safeway would mail her a check. Safeway did not pay the plaintiff until January 5, 1990. Ms. Livadas alleges that this delay in payment violated California Labor Code § 201, which requires employers to remit unpaid wages to discharged employees immediately upon termination. Labor Code § 203 provides penalties for employer noncompliance with § 201.

On January 3, 1990, Ms. Livadas called the Napa office of the California Division of Labor Standard Enforcement (DLSE) to file a claim regarding the outstanding wages. The plaintiff allegedly spoke to two officers who told her that the DLSE could not process her claim. On January 8, 1990, the plaintiff went in person to the DLSE's Napa office. Once again, the officer on duty refused to process her claim and told Ms. Livadas that she must process her claim through her union, and that if her union refused to handle her wage claim, she should contact the National Labor Relations Board (NLRB).

Karen Livadas filed a complaint against the defendant, Lloyd Aubry, Jr., in his official capacity as Labor Commissioner for the State of California, seeking injunctive and declaratory relief and damages flowing from an alleged agency policy of discrimination in the enforcement of the California Wage and Hour Law against employees who work under collective bargaining agreements which have arbitration

clauses. The parties agree that the defendant provides certain valuable protections and benefits to all California employees except those who work under collective bargaining agreements (CBA's) containing arbitration clauses. The plaintiff alleges that the defendant's policy denied her access to the investigatory, prosecutorial, and remedial resources provided under California Labor Code sections 79 through 104 for the sole reason that she is an employee with a CBA containing an arbitration clause. The plaintiff alleges that DLSE's denial of benefits interferes with her federal rights under the NLRA, and therefore violates 42 U.S.C. § 1983.

Both of the parties agree that the policy of the DLSE is to enforce Labor Code §§ 201 and 203 for all employees except for those whose work is governed by CBA's containing binding arbitration clauses. Ms. Livadas argues that on this basis alone, the Court can resolve her motion for summary judgement in her favor.

The plaintiff alleges that her participation in a labor union and in collective bargaining constitute federally protected rights, and that the defendant's denial to the plaintiff of benefits under California law on the basis of her exercise of her federally created rights violates 42 U.S.C. § 1983. The plaintiff argues that the NLRA establishes a system under which employers and employees are each provided with economic weapons which they may use against each other. One of the rights granted to employees is the right to bargain collectively. The state's denial to employees working under a CBA with an arbitration clause of the valuable benefit at issue upsets the balance of power established by the NLRA. The plaintiff argues than the provision of such a valuable state benefit cannot be conditioned upon the employees relinquishment of the federally created right of collective bargaining.

In his answer, the defendant affirmatively alleges, among other defenses, that the terms of the plaintiff's employment at Safeway were governed by a CBA which contains a mandatory and binding arbitration clause, and that the DLSE properly investigated and dismissed the plaintiff's claim on

the grounds that federal labor law preemption doctrine precludes the Commissioner from interpreting or applying the terms of the CBA to determine damages allegedly due to the plaintiff. The DLSE argues that federal preemption doctrine makes the interpretation of CBA's a matter for the labor arbitrator and the NLRB. Since damages under § 203 are determined in terms of wages, which are established by the CBA, the defendant argues that enforcement of the statute would entail interpretation of the CBA, which is preempted. The defendant claims that the plaintiff should have the dispute resolved through the grievance arbitration scheme established by the CBA. The defendant claims that this policy actually encourages labor arbitration.

The plaintiff claims that the policy discourages collective bargaining and arbitration because it denies to employees working under a CBA containing an arbitration clause the benefit of state enforcement procedures, which are granted to all others employees. A union employee may not vindicate the right at issue in this case through arbitration because the arbitrator is allowed to enforce only those rights which stem from the CBA. Since the right at issue in this case stems from state law, rather than from the CBA, the arbitrator can not enforce it. The result is that union employees are forced to bargain for a valuable benefit which all other employees receive automatically. Also, since the right to payment of wages upon termination and for penalties for non-compliance stems from state law rather than from the CBA, enforcement of the law does not require interpretation of the CBA, and so is not subject to federal preemption doctrine.

PROCEDURAL POSTURE

The precise questions at issue here have previously been before the Court. In its May 15, 1990 Order, this Court cancelled oral argument and denied both parties' motions for summary judgement on the ground that there were genuine disputes as to material facts in the case. In its June 27, 1990

Order, the Court granted the plaintiff's motion for reconsideration of the Court's May 15, 1990 Order on the ground that the defendant's basis for disputing certain facts which the Court held to be at issue in its earlier Order, were not sufficient to create genuine issues for trial under Fed.R.Civ.P. 56(e); were questions of law rather than of fact; or were immaterial to the resolution of the case. In its August 24, 1990 Order, the Court *sua sponte* again rescheduled hearing to allow the parties to address the threshold issue of whether the NLRA creates a private right in this instance actionable by the plaintiff under 42 U.S.C. § 1983.

In its May 2, 1990 Order, the Court denied the defendant's motion under Fed.R.Civ.P. 19 to compel joinder of plaintiff's employer, Safeway Stores, and her union, Local 373 of the United Food and Commercial Workers, as necessary parties.

Legal Standard for Summary Judgement

Summary judgement is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgement as a matter of law. *Jung v. FMC Corp.*, 755 F. 2d 708, 710 (9th Cir. 1985); Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1976). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* To oppose a motion for summary judgement on the ground that there is a genuine issue of material fact in dispute a party, ". . . may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

DISCUSSION

Private Right of Action

The threshold issue is whether the NLRA right at issue in this case is actionable under 42 U.S.C. § 1983. We hold that

it is. In *Golden State Transit Corp. v. City of Los Angeles, (Golden State II)* 110 S. Ct. 444 (1989), the Supreme Court held that the NLRA gives employees and employers a private right, enforceable under 42 U.S.C. § 1983, to engage in free collective bargaining without penalty or restraint by the State.

Golden State Transit Corp. v. City of Los Angeles, (Golden State I) 475 U.S. 608 (1986) and *Golden State II* involved the labor negotiations of the Golden State Transit Corp., a taxicab company. At the time that Golden State's operating franchise license expired, and was subject to a renewal decision by the City of Los Angeles, Golden State was in the midst of a strike by its workers. The City refused to renew Golden State's operating license so long as the company remained in a labor dispute with its workers.

Golden State sued the City for an injunction and damages under § 1983. In *Golden State I*, the Supreme Court held that the City's action penalized Golden State for the exercise of rights granted under the NLRA. The Court held that the NLRA gave employers the right to withstand the demands of striking workers, just as it gave workers the right to strike. The City's action imposed a penalty, or additional burden on the cab company for the exercise of its NLRA right, thereby upsetting the power balance between labor and management established in the NLRA. On remand, the district court enjoined the city to reinstate the franchise, but held that the NLRA did not create a private right of action under § 1983. The Ninth Circuit affirmed.

In *Golden State II*, the Supreme Court expressly held that the NLRA granted the cab company rights enforceable under § 1983. The Court's analysis begins with the language of § 1983 which provides for a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," which, the Court notes, "plainly indicates [that] the remedy encompasses violations of federal statutory as well as constitutional rights." *Golden State II*,

110 S. Ct. at 448. The Court followed with the two-step analysis of *Middlesex County Sewerage Authority v. National Sea Clammers Assn., (Sea Clammers)*, 453 U.S. 1 (1981).

The first step of the *Middlesex* test requires the Court to determine "whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' " *Golden State II*, 110 S. Ct. at 448 (citations omitted). The Court also must determine whether "the provision in question was 'inten[ded] to benefit' the putative plaintiff." *Id.* (citations omitted). On this issue, the *Golden State II* Court held:

> We agree with petitioner [Golden State Cab Co.] that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983.
>
> *Id.* at 450
>
> The NLRA creates "rights" in labor and management that are protected against governmental interference.
>
> *Id.* at 449.

The second part of the *Sea Clammers* test is that even if there is a federal right, the defendant may show that Congress " 'specifically foreclosed a remedy under § 1983,' by providing a 'comprehensive enforcement mechanism for protection of a federal right.' " *Golden State II*, 110 S. Ct. at 448, (citations omitted). The Court noted that " 'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Id.* at 449, (citations omitted). The *Golden State II* Court held:

> a § 1983 action is [not] precluded by the existence of a comprehensive enforcement scheme. Although the National Labor Relations Board has exclusive jurisdiction

> to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct protected by the NLRA against governmental interference. There is thus no comprehensive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the § 1983 remedy.
>
> *Id.* at 449-50, (citations omitted).

The same analysis must apply in the case of Karen Livadas. The answer to the second question of the *Sea Clammers* test is clear. The § 1983 remedy is not precluded by a comprehensive enforcement scheme, since the National Labor Relations Board does not have the authority to protect NLRA rights against state interference.

The answer to the first question of the *Sea Clammers* test is equally clear, and appears even to be presupposed by the *Golden State II* opinion. Since the NLRA creates rights in employers enforceable against state interference under § 1983, it must equally vest employees with those rights. The *Golden State II* Court held:

> The NLRA, however, creates rights in *labor and management* both against one another and against the State. By its terms, the Act confers certain rights "generally on *employees* and not merely as against the employer." (emphasis added, citations omitted).
>
> *Id.* at 450.
>
> We have held, based on the language, structure, and history of the NLRA, that the Act protects certain rights of *labor and management* against governmental interference. (emphasis added).
>
> *Id.* at 451.
>
> the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another,' is a right specifically conferred on *employers and employees* by the NLRA.

> *Id.* at 452. (emphasis added).

It is clear that employees, as well as employers, were "the intended beneficiaries of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives [them] rights enforceable against governmental interference in an action under § 1983." *Id.* at 450.

The DLSE relies upon *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) to argue that while the employer unquestionably has a private right of action under § 1983, individual employees do not have a like right, but that instead, only their union representative has the § 1983 right of action. *Emporium Capwell* involved a small group of unionized employees who wished to negotiate a labor agreement with their employer separate from their union. The *Emporium Capwell* Court held that collective bargaining demanded that all unionized employees be represented by their democratically elected union representatives, and that separate representation of certain employees would undermine the union's bargaining power as well as the purposes of the NLRA.

In this case, Karen Livadas' action does not undermine the position of her union, but rather helps to vindicate her right to participate in union activity free from penalty. In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830-37 (1984), the Supreme Court decided that the NLRA creates rights enforceable by individual employees, as well as their unions. In *City Disposal* a truck driver refused to drive his vehicle, because he alleged that it had faulty brakes, and that under his CBA he was not obliged to operate unsafe equipment. The driver was discharged and he brought an action challenging the discharge.

The Supreme Court allowed the action by the individual employee, on the ground that the action itself implicated the collective activity of all the workers. The Court noted that it

would not "make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer." *Id.* at 832. The Court continued:

> When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to insure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks.
>
> *Id.* at 832.

Similarly, Livadas' action implicates the rights of all of her fellow workers. *City Disposal* affirms the right of an individual employee to defend what she and her co-workers have won through concerted union activity.

Indeed, the plain language of the NLRA shows its intent to bestow rights on individual employees. The Act explicitly designates "employees" as the recipients of NLRA rights. Section seven of the NLRA is entitled "Rights of Employees." 29 U.S.C. § 157.

Therefore, it is clear that Karen Livadas has a private right of action under § 1983 to bring this case as an individual to vindicate her NLRA rights from interference by the state.

Does the State Action at Issue Infringe Upon the NLRA Right?

The NLRA was designed in large part to establish rights in employees and employers to engage in certain activities which had previously been of questionable legality. The NLRA armed both employer and employee with certain economic weapons, such as the employees' strike and the

employers' lock-out, in an effort to create a balance of power between the two, with the goal of promoting the peaceful settlement of disputes between the parties. Through the NLRA, Congress hoped to move from a history of often violent labor-management relations to a period of "industrial peace."

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.
>
> *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

As well as granting employees and employers rights against each other, the NLRA also granted them rights against the state. *Golden State II*, 110 S.Ct. at 450. Prior to the enactment of the NLRA, it was quite common for state courts to enjoin collective activities of workers, especially strikes. See, e.g., *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896); *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass. 537, 130 N.E. 86 (1921).

After the enactment of the NLRA, such state court labor injunctions were held to violate the delicate balance of power established by the NLRA by placing the power of the state on the side of the employer. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court held that a state court could not enjoin a union picket because the injunction "create[d] potential frustration of national purposes." *Id.* The state was not allowed to place its power behind one party in a labor dispute, since that interfered with the scheme established by the NLRA. The *Garmon* Court held that the state court injunction was preempted by federal labor law.

In the case of Karen Livadas, the state action does not take the traditional form of positive sanctions, such as the labor injunction of *Garmon*. Rather, the state has denied a privilege to certain employees who have exercised their NLRA right to collectively bargain. Here the state grants a privilege to all workers, except those who work under a CBA with an arbitration clause. The analysis must be in two parts: (1) Does the NLRA create a right to work under a CBA with an arbitration clause; (2) does the DLSE action infringe upon this right?

1. *The NLRA Creates a Right to Work Under a CBA with an Arbitration Clause.*

The first question is quite straight forward. The right to collectively bargain is the very essence of the NLRA, and the Supreme Court has repeatedly held that arbitration is "part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

Section 7, which is the heart of the NLRA, 29 U.S.C. § 157, states:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, *to bargain collectively* through representatives of their own choosing . . .
>
> (emphasis added).

"The principal purpose of the [National Labor Relations] Act was and is to protect workers who want to organize for collective bargaining." *American Hospital Association v. National Labor Relations Board*, 899 F. 2d 651 (7th Cir. 1990).

As noted above, the right of grievance arbitration is inseparable from the right of collective bargaining itself. The Court has noted that without arbitration, there is no way to resolve contract disputes short of a strike or federal lawsuit. Arbitration is the *quid pro quo* for which unions exchange their right to strike during the term of the CBA. *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235, 247-8 (1970). Fully 96% of CBA's provide for arbitration. *Characteristics of Major Collective Bargaining Agreements* (U.S. Dept. of Labor Bull. 2013, 1979), 82.

The Supreme Court held in *Warrior and Gulf*, 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L. Ed. 2d 1409, that labor arbitration is "at the very heart" of the collective bargaining process; it "is actually a vehicle by which meaning and content are given to the collective bargaining agreement." "The grievance procedure is, in other words, a part of the continuous collective bargaining process."

Therefore, there can be no question that just as the NLRA creates a right in employers to withstand labor strikes, *Golden State I*, *supra*, the Act equally creates a right in workers to negotiate and to work under CBA's, and that this right entails the right to incorporate an arbitration clause in the CBA. It is this right upon which Karen Livadas contends the DLSE's action infringes.

The DLSE contends that its policy does not actually discriminate against union members, because it is possible for union members to work under a CBA which does not have an arbitration clause, or to work without any CBA at all. These union workers would be entitled to the payment enforcement benefits which Livadas seeks. Also, DLSE continues, it is possible for non-union employees to work under a CBA which has an arbitration clause.

DLSE misses the point. This is *not* an equal protection case alleging discrimination against union members. Rather, it is a case alleging state interference with the exercise of the federal right to work under a CBA which has an arbitration clause. The NLRA grants the right to collectively bargain to all employees, union and non-union. The remaining question is whether the State's refusal to enforce the wage payment statute on the behalf of workers who work under CBA's with arbitration clauses infringes upon that right.

2. *The DLSE's Action Infringes Upon the Right to Work Under a Collective Bargaining Agreement Containing an Arbitration Clause.*

In the case of Karen Livadas, the state does not positively enjoin Livadas from exercising her NLRA right to collectively bargain, rather, it denies her a benefit because she exercised that right. In the cases noted above, (*Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896); *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass. 537, 130 N.E. 86 (1921); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)), the state enjoined union activity which was protected under the NLRA, specifically striking or picketing. In the instant case, the state denies a benefit to workers who exercise their NLRA right to work under CBA's with arbitration clauses.

The defendant enforces §§ 201 and 203 of the California Labor Code for all workers except those who work under CBA's with arbitration clauses. Section 201 provides that discharged employees must be paid all wages due upon termination. Section 203 provides for penalties for employer non-compliance with § 201. There is no question that state enforcement of the statute constitutes a valuable benefit. The defendant refuses to extend this benefit to workers such as Karen Livadas.

There would be no question that the state could not directly sanction Karen Livadas for working under a CBA, because that would constitute an interference with her federal rights. The defendant's policy similarly interferes with Livadas' federal NLRA right to collectively bargain.

The Supreme Court has made clear that the state may not condition the receipt of a valuable benefit upon the relinquishment of a federal right. The Ninth Circuit stated in *Bullfrog Films, Inc. v. Wick*, 847 F. 2d 502, 511 (9th Cir. 1988):

> government may not condition the conferral of a benefit on the relinquishment of a constitutional right: "For at least a quarter-century, this Court has made clear that

> even though a person has no 'right' to a valuable governmental benefit . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."
>
> Citing, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).[1]

Recent Supreme Court precedent in the labor law area supports this premise. In *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986), the State of Wisconsin denied to repeat violators of the NLRA eligibility for state procurement contracts. Clearly, such contracts were merely a privilege, rather than a right, but the Supreme Court held that the privilege could not be conditioned upon the relinquishment of NLRA rights. In *Gould* the state had used its power on the side of labor, thereby upsetting the balance of power established by the NLRA. (The state's action was therefore held to be preempted by federal labor law. *See*, section on NLRA preemption doctrine, *infra*).

Golden State I is in accord. In *Golden State I* the City of Los Angeles refused to renew the Golden State Taxi Company's franchise permit unless it resolved a strike with its workers. The Supreme Court held that Golden State had a right under the NLRA to withstand the strike. Even though the franchise permit was a privilege, the Court held that the City could not condition the receipt of the privilege on the company's relinquishment of its NLRA right to withstand the strike. The Court held that "the settlement condition imposed by the Los Angeles City Council . . . destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons." 475 U.S. at 619. "Federal law intended to leave the employer and the union free to use their economic weapons against one another." *Id.* at 618, (citations omitted).

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[1] For example, the state could not grant every citizen a tax rebate, except for those who engage in collective bargaining, even though the action would be the denial of a benefit or privilege rather than a direct sanction.

It is clear that employees possess the NLRA right to use economic weapons free from state interference just as much as employers enjoy that right. *Id.* at 618. In the case of Karen Livadas, the state has denied her the privilege of enforcement of California Labor Code §§ 201 and 203 solely on the basis that she works under a collective bargaining agreement having an arbitration clause. The denial of this privilege, like the denial of the privilege of a taxi franchise license, interferes with the exercise of NLRA rights. The only way for employees to receive the privilege is for them to relinquish their NLRA right to collectively bargain. As in *Golden State I*, the state is disallowed from upsetting the "balance of power" established by the NLRA, by allocating privileges in such a way that encourages either labor or management to relinquish its NLRA rights. The DLSE's policy in this case infringes upon Karen Livadas' NLRA right to work under a CBA with an arbitration clause, just as the City of Los Angeles' policy in *Golden State I and II* infringed upon the cab company's NLRA right to withstand a strike.

As discussed earlier, the NLRA right at issue is actionable under § 1983. The DLSE policy therefore constitutes action under color of state law which infringes upon Karen Livadas' NLRA rights in violation of § 1983. *Golden State II*.

Preemption

The DLSE contends that it is preempted from enforcing §§ 201 and 203 on behalf of employees who work under CBA's having arbitration clauses. The DLSE rests its contention on two grounds: (1) section 229 of the California Labor statute; (2) federal labor law preemption doctrine under § 301 of the Labor Management Relations Act (LMRA).

1. ***Preemption Under the California Labor Statute.***

The DLSE bases its refusal to prosecute Karen Livadas' late wage payment claim at least in part on California Labor Code § 229, which states:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

DLSE relies on the decision of the California Court of Appeals in *Plumbing, Heating and Piping Employers Council of Northern California v. Howard, (Howard)*, 53 Cal.App.3d 828 (1975), which held § 229 to "preclude the Labor Commissioner from hearing and enforcing a claim for collection of alleged due and unpaid wages by an employee who belongs to a union which has entered into a collective bargaining agreement which contains an arbitration clause." *Id.* 53 Cal.App.3d at 832-3.

The short answer is that preemption doctrine is a matter of federal, not state law. A primary purpose of preemption doctrine was to maintain a uniform federal labor law doctrine and to protect federal NLRA rights. Insofar as § 229 and the State's interpretation of it in *Howard* goes beyond the limits of federal preemption doctrine, it is invalid. The DLSE must provide the benefit of enforcement of the wage payment statute to all employees equally unless the federal preemption doctrine *requires* the State to deny enforcement of the wage payment provision to union members working under a CBA. As we shall see below, preemption is not required under federal preemption doctrine.

2. ***Federal Preemption Doctrine.***

There are three major strands of federal labor law preemption doctrine, one based upon § 301 of the Labor Management Relations Act (LMRA) and two based upon §§ 7 and

8 of the NLRA. It is the § 301 doctrine which is the source of greatest contention in this case, but NLRA §§ 7 and 8 preemption issues arise as well.

a. *LMRA Section 301 Preemption*

Section 301 preemption doctrine was established in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and was developed significantly in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). The *Lucas Flour* Court held that § 301 reflected an intention to have a single federal law of CBA interpretation. For this reason, CBA interpretation was held to be a matter for the labor arbitrator, the National Labor Relations Board, and the federal court. The parties to a CBA are not allowed to bypass the arbitration process by filing a claim, such as one for breach of the CBA, in state court. For the employee to do so was also seen as undermining the central role of the labor arbitrator as the primary interpreter of the CBA.

Allis-Chalmers v. Lueck, 471 U.S. 202, 212 (1985) held that the state court is preempted from hearing cases, even if based in part on state law, if the state claim is "inextricably intertwined with consideration of the terms of the labor contract." Such cases must be heard by the labor arbitrator. *Id.* at 213. In *Allis-Chalmers*, the employee instituted a state tort action against his employer in state court. However, the duty establishing the tort ultimately derived from "the rights and obligations established by the contract." *Id.* at 217. The Supreme Court therefore held that the state court was preempted from hearing the tort action "[b]ecause the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 218.[2] The Court also noted that an identical claim could

[2] Both parties bring to the attention of the Court, *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990). *Stikes* involved a suit brought by the employee, Stikes, who claimed that the employer's search of Stikes' automobile violated his California State Constitutional right to privacy. The Ninth Circuit held that the suit was preempted under LMRA § 301 since the privacy right turned on the employee's reasonable expectation of privacy, which in turn depended in part on interpretation of the CBA. Interpretation of the CBA was especially important since it contained a provision whereby the union agreed to encourage its employees to participate in the employer's safety program, which included random searches. The State law claim was therefore found to be "inextricably intertwined with the collective bargaining agreement." *Id.*, 914 F.2d at 1269.

For the reasons below, we find that Karen Livadas' state law claim is not similarly intertwined with interpretation of her CBA. While an employee's reasonable expectations of privacy are rooted at least in part in the CBA, the claim for timely payment of final wages is based solely upon state law and not upon the CBA.

have been brought before the arbitrator based upon CBA provisions.

The defendant argues that we should follow *Allis-Chalmers* in the instant case, and require Ms. Livadas to bring her claim before the labor arbitrator. The defendant argues that enforcement of the state provision at issue for employees working under a CBA would be "inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. The defendant reads *Allis-Chalmers* too broadly, as is clear from subsequent cases.

In the case of Karen Livadas, the right she seeks to have vindicated does not derive from her contract, but rather, from state law. State law requires the employer to make full payment of wages due to a discharged employee upon termination. Failure to comply with this provision results in penalties. The simple question of whether the statute was violated can be determined wholly independently from the CBA. Karen Livadas was not paid until three days after her termination. It requires reference only to a calendar, not to the CBA, to determine that the statute was violated and penalties are due.

Also, unlike the employee in *Allis-Chalmers*, Livadas could not have brought this claim to the arbitrator. The arbitrator may base her decisions solely upon the terms of the CBA, and not upon public law. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 53-54 (1974). Since the CBA contains no term requiring wage payment immediately upon termination, and imposes no penalty for failure to make such timely payment, there would be no arbitrable issue.

Later cases are in accord with this reading. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), a unanimous Supreme Court held that a union employee was not preempted from bringing a state tort claim alleging that the employer had retaliatorily discharged the employee who had filed a worker's compensation claim. The claim was not preempted even though the employee could and did file a concurrent claim with the labor arbitrator under a CBA provision prohibiting discharge without just cause, and even though both claims were based on the same set of events.

The Court held that the state law action was not preempted because it involved a "purely factual inquiry [which did] not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 preemption purposes . . ." *Id.* at 407.

In *Operating Engineers v. Wilson*, 915 F. 2d 535 (9th Cir. 1990) the Ninth Circuit held that a state law claim for fraud in the inducement of a collective bargaining agreement was not preempted by § 301. In *Operating Engineers* an employer claimed that a union agent had fraudulently induced him to sign a collective bargaining agreement. The Court, relying on the reasoning of *Lingle*, held that the "state tort claim for fraud in the inducement [of the collective bargaining agreement] is not preempted by section 301 because it does not require reference to the collective bargaining agreement." *Id.*, 915 F.2d at 539.

Our case is quite similar. The state law question can be resolved based on a "purely factual inquiry," *Lingle*, 108 S. Ct. at 1882, of whether the wage payment was made at the time of termination. There is no question that it was not. There is no need to refer to the terms of the CBA to resolve this question.

The defendant argues that penalties under the state statute are based upon wages. The statute provides that the employee is entitled to continue to receive wages until the employer remits the last wage payment. The defendant argues that determination of penalties would therefore require interpretation of the CBA, which is preempted, and should be a matter for the labor arbitrator.

Lingle resolves this issue by holding that "tangential" issues, such as damages in a state law action, may be determined without preemption:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand . . . the separate state law analysis would not be thereby pre-empted.
>
> *Lingle*, 486 U.S. at 413, n. 12.

The *Lingle* court noted that Title VII cases involving union members are not preempted as a matter of federal law, even though damages are based upon backpay, which requires determination of the wage rate set by the CBA. 108 S. Ct. at 1885. Such an issue is "tangential" to the underlying anti-discrimination claim.

The *Allis-Chalmers* Court stated similarly, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301." 471 U.S. 202, 211. See also, *Caterpillar Inc. v. Williams*, 482 U.S. 386

(1987) (state law action for breach of individual employment contract is not preempted by federal labor law). The issue of penalties is a "tangential" issue, as described in *Lingle*, and so does not require the preemption of the underlying state claim, which can be resolved independently of the CBA.

The defendant argues further that the very issue of arbitrability is an arbitrable issue under the terms of the CBA. They argue that the CBA states that the arbitrator is to decide whether any given dispute is arbitrable. Therefore, the DLSE claims that the threshold determination requires interpretation of the CBA, and the matter is therefore pre-empted.

The defendant's argument is without merit. It would pre-empt every possible dispute, (including Title VII claims), raised by a union employee since the arbitrator would first have to determine whether the issue was covered by the CBA. Where an employee's claim is based upon state law rather than upon the labor contract, federal law does not require arbitration because there is nothing to arbitrate. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

Also, as *Lingle* shows, even if a matter is arbitrable, a concurrent state claim will not be preempted if that claim can be resolved independently of the CBA. In *Lingle* the employee brought both a state claim in state court and a CBA claim before the arbitrator, and there was no preemption.

> [I]f dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.
>
> *Lingle*, 486 U.S. at 409-10.

The critical issue for § 301 preemption is whether the state claim can be resolved independently from the CBA (except

for "tangential" issues). As discussed above, Karen Livadas' claim is not preempted based upon this test.

b. *NLRA §§ 7 and 8 Preemption*

There are two varieties of federal labor law preemption arising from §§ 7 and 8 of the NLRA.[3] *Garmon* preemption, based upon *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959); and *Machinists* preemption, based upon *Lodge 76, International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n* 427 U.S. 132 (1976). *Garmon* preemption prohibits the state from interfering with activity expressly permitted by the NLRA. (In *Garmon* the state had enjoined a union picket). *Machinists* preemption prevents the state from interfering with activity which the NLRA intended to leave unregulated. (In *Machinists* the state had penalized workers who refused to work overtime. The *Machinists* court held the action to be preempted even though the NLRA does not expressly allow such worker activity.)

The plaintiff argues that enforcement of Labor Code §§ 201 and 203 on behalf of employees working under CBA's having arbitration clauses would not be preempted by NLRA §§ 7 and 8 preemption doctrine, because the Labor Code provisions constitute a state minimum labor standard. The plaintiff further argues that the DLSE's refusal to enforce the Labor Code provisions for employees such as Karen Livadas is preempted by the NLRA since the discriminatory enforcement upsets the balance of power between labor and management established by the NLRA.

In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), a unanimous Supreme Court held that "in any pre-emption analysis, '[t]he purpose of Congress is the ultimate touchstone.' " *Id.* at 747 (citations omitted), and "courts

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[3] NLRA §§ 7 and 8 preemption was addressed tangentially above, in the section entitled, "DOES THE STATE ACTION AT ISSUE INFRINGE UPON THE NLRA RIGHT?"

sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Id.* at 747-48.

The *Metropolitan Life* Court held that the purposes of the NLRA were to establish an "equality of bargaining power between employees . . . and employers . . ." and to address the "problem of depressed wage rates." *Id.* at 753-54. Therefore, state regulations which "alter the economic balance between labor and management [established by the NLRA]" would be preempted. *Id.* at 750, citing, *New York Telephone Co. v. New York Labor Dept.*, 440 U.S. 519, 532.

In *Metropolitan Life*, the Supreme Court found *not* preempted a state law which required all employers, union and non-union, to provide a certain level of mental health insurance to all insured employees. The Court held that the law was not preempted, even though many CBA's already had terms governing mental health. The court reasoned that "minimum labor standards" of "general applicability" are not preempted because they "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Id.* at 755. Since such benefits affect all workers equally, they neither encourage nor discourage workers from joining labor unions, and therefore do not upset the balance established by the NLRA.

The Court, noting the purpose of the NLRA to improve the status of workers stated:

> It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.
>
> *Metropolitan Life*, 471 U.S. at 756.

By the Supreme Court's analysis, the DLSE seeks to turn the Wagner Act on its head by providing the benefit of the enforcement of the timely final wage payment provisions only to non-union employees and not to the union employees who were the intended beneficiaries of the NLRA.

Also, DLSE's discriminatory enforcement of the Labor Code provisions upsets the balance of power between labor and management established by the NLRA. It arms employers with an additional weapon to use against unionization, since they will be able to warn employees that if they decide to collectively bargain, they will lose their state right to timely wage payment enforcement. California Labor Code §§ 201 and 203 establish timely payment of final wages as a minimum term of employment for all workers, just as the statute in *Metropolitan Life* established mental health care as a minimum term of employment in Massachusetts. The state may not deny enforcement of that benefit only to workers who are parties to a CBA with an arbitration clause. *A fortiori*, the State is clearly not preempted from providing this benefit to employees who work under CBA's.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) is quite similar to the case at bar. *Fort Halifax* addressed a Maine statute which required employers with more than 100 employees to pay their workers substantial severance pay if they closed or moved their factories. The employer argued that the state was preempted from enforcing the statute on behalf of union employees. The Court held that since the statute applied equally to all workers, it did not upset the balance established by the NLRA, but rather established "rights under state law [which formed] a 'backdrop' for their negotiations." *Id.* at 21, (citations omitted).[4]

From *Fort Halifax* and *Metropolitan Life*, it should be abundantly clear that the state is free to enforce minimum

[4] In *Fort Halifax*, as in our case, the amount of severance pay due under the state statute was determined based upon the employees' wage rate at the time that the plant closed, which would, of course, be based upon the CBA. Still, the Court held that the Maine statute was not preempted.

standards regarding wages and conditions of employment on behalf of all employees in the state. The statute at issue in the instant case establishes as a minimum condition of employment in the state of California, that if an employee is fired, the employer must pay all wages due at the time of termination. It is also clear from these cases that if California is to establish such a minimum standard of employment, it must do so for all employees, not only those who do not engage in collective bargaining.

In *Golden State I*, *supra*, the City of Los Angeles was preempted by federal labor law, from conditioning the benefit of a taxi franchise license upon the resolution of a strike. The Court held that the NLRA conferred a right upon the employer to withstand the strike, and refuse to negotiate. The City's refusal to grant the employer a franchise license until resolving the strike interfered with the employers NLRA right, and so was preempted by federal labor law. The Court applied preemption analysis and determined that the state's action upset the balance of power established by the NLRA, by "favoring the union." 475 U.S. at 619. "States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts." *Id.* at 614-15. In other words, the City could not grant licenses only to taxicab companies who did not exercise their NLRA rights to withstand strikes.

In the instant case, the state's action interferes with Karen Livadas' NLRA right to collectively bargain. It denies her the benefit of enforcement of §§ 201 and 203 of the California Labor Code solely because she works under a CBA with an arbitration clause. As in *Golden State I*, Livadas is penalized for engaging in an NLRA-protected activity (collective bargaining), and therefore, as in *Golden State I*, the state has "destroyed the balance of power designed by Congress," *Id.* at 619, and the discriminatory policy is preempted.

For the foregoing reasons, and after careful consideration of motions, legal memoranda, exhibits, and arguments of the parties, and consistent with the accompanying Memorandum Opinion, IT IS HEREBY ORDERED that:

1. The plaintiff's motion for summary judgement is GRANTED;

2. The defendant's countermotion for summary judgement is DENIED;

3. The defendant, Lloyd Aubry, and his successors as Labor Commissioner for the State of California, are hereby enjoined to enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause;

4. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby ordered to institute an action in the California State Courts pursuant to California Labor Code section 203 to recover any and all penalties due to the plaintiff, Karen Livadas, by her employer, Safeway Stores, on account of her employer's willful failure to pay her wages due at the time of discharge;

5. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby declared to have violated the rights of the plaintiff, Karen Livadas, under the National Labor Relations Act, by refusing to afford her certain protections and benefits of the California Wage and Hour Law, (specifically, the enforcement of Labor Code sections 201 and 203), solely on the basis of the fact that her employment was governed by a collective bargaining agreement having an arbitration clause;

6. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby ordered to pay as compensatory damages to the plaintiff, Karen Livadas, the full value of her wage claim in the event that the claim is held time-barred by the California State Courts;

7. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby ordered to pay the plaintiff, Karen Livadas, a reasonable attorney fee and costs of suit herein.

IT IS SO ORDERED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN LIVADAS,
PLAINTIFF-APPELLEE,

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
DEFENDANT-APPELLANT.

No. 90-16650
D.C. No.
CV-90-0468-TEH

ORDER

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THELTON E. HENDERSON, District Judge, Presiding

Argued and Submitted
May 13, 1991—San Francisco, California

Filed September 11, 1991
Amended March 8, 1993

Before: Arthur L. Alarcon, Alex Kozinski and
Pamela Ann Rymer, Circuit Judges

ORDER

The opinion filed September 11, 1991, is amended as follows:

Slip opinion, page 12606 (943 F.2d 1140), add a footnote 2 at the end of the second line, which ends with ". . . granted summary judgment in her favor."

> [2] We recently held in *Barnes v. Stone Container Corp.*, 942 F.2d 689 (9th Cir. 1991), that imposition of a just cause term by the Montana Wrongful Discharge Act, which excepted employees covered by a collective bargaining agreement, on parties who were in the process of negotiating a new collective bargaining agreement, interferes with the collective bargaining process and is therefore preempted by the NLRA under *International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Unlike this case, Barnes was a private action between employee and employer where the issue was whether the employee could permissibly pursue a state law claim without running afoul of *Machinists* preemption even though he was not then covered by a collective bargaining agreement. Here, there is no dispute that Livadas is covered by a collective bargaining agreement with an arbitration clause that is normally subject to federal preemption. Nor is there any contention that California Labor Code § 229 incorrectly incorporates preemption principles or is inapplicable to the Commissioner's decision whether to prosecute Livadas's claim against Safeway. Accordingly, Livadas's case is not like *Golden State*, where the city's condition itself was impermissible, *Barnes*, where the state's preemption provision was inapplicable, or *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, 1152-54 (4th Cir. 1992), where the state's excepting labor disputes from its trespass law cut too broad a preemption path.

Judge Kozinski, as dissenter, neither joins in nor opposes the amendment to the majority opinion contained in this order.

With the above amendment, the majority of the panel has voted to deny the petition for rehearing. Judge Rymer has voted to reject the suggestion for rehearing en banc and Judge Alarcon so recommends. Judge Kozinski has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

3

FILED
AUG 18 1993

No. 92-1920

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

KAREN LIVIDAS,
Petitioner,

VS.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

May a state agency refuse to ad udicate claims filed by workers employed under the terms of collective bargaining agreements containing arbitration clauses when state law prohibits the agency from entertaining any claims involving any dispute regarding the interpretation or application of any collective bargaining agreement containing an arbitration clause

LIST OF PARTIES

All of the parties to the proceedings in the courts below are listed in the caption.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

KAREN LIVIDAS,

Petitioner,

VS.

LLOYD W. AUBRY, JR., IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

A. *Background*

The California State Labor Commissioner, chief of the Division of Labor Standards Enforcement, is the state officer authorized to enforce all of the provisions of the California Labor Code the enforcement of which are not specifically

vested in any other officer[1]. As a part of this enforcement scheme, the Labor Commissioner may provide for a hearing to adjudicate claims of workers for recovery of wages, penalties and other demands for compensation properly before the Labor Commissioner[2].

Among the protections afforded California workers is the requirement, imposed upon employers by the provisions of Labor Code §201, that employees[3] discharged from their employment must be paid at the time of discharge. Labor Code §201 provides, *inter alia*:

> "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." (Emphasis added)

Willful violations of Labor Code §201 subject an employer to penalties pursuant to Labor Code §203. Labor Code §203 provides:

> "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. No employee who secretes or absents himself to avoid payment to him, or who refuses to receive payment when fully tendered to him, including any penalty then accrued

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[1]California Labor Code §95(a)

[2]Labor Code §98(a)

[3]Employees in certain seasonal employments (§201), and those employed in the motion picture industry (§201.5), oil well drilling industry (§201.7), and agriculture industry (§205.5) are not required to be paid immediately upon discharge.

> under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment.
>
> "Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." (Emphasis added)

The jurisdiction of the California State Labor Commissioner to determine any controversies involving wages, penalties or other demands for compensation is limited, however. California Labor Code §229 provides:

> "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement."

In 1975, the California State Court of Appeal, First Appellate District, permanently enjoined the Labor Commissioner from accepting or adjudicating wage claims where the *interpretation* or *application* of any collective bargaining agreement which contains an arbitration agreement is required. *Plumbing, Heating and Piping Council of Northern California v. Howard* (1975) 53 Cal.App.3d 828, 835.

In response to this injunction, the Labor Commissioner developed a policy which precludes agency personnel from processing claims involving any dispute which would require the agency to interpret or apply the provisions of a collective bargaining agreement containing an arbitration clause. The policy only applies to situations where there exists a CBA which contains an arbitration clause. The policy does not preclude acceptance or processing of claims filed on behalf of

workers who are employed under the terms of collective bargaining agreements which do not have arbitration clauses[4].

Further, the policy does not preclude workers employed under the terms of a CBA containing an arbitration clause from filing claims for the recovery of wages, penalties or demands the recovery of which would not require the application or interpretation of the terms of the collective bargaining agreement[5].

In addition, inasmuch as the enforcement of California's minimum labor standards[6] is not predicated upon the application or interpretation of the terms of a collective bargaining agreement, the presence or absence of such an agreement, or the inclusion of an arbitration clause in such a collective bargaining agreement, would have no effect on the enforcement of those minimum labor standards. Minimum labor standards such as minimum wage and overtime, unlike the enforcement of the penalty statute at issue here, depend entirely on criteria contained in the charging statute.

The Labor Commissioner's policy in regard to processing of any disputes involving the application or interpretation of

---

[4]The statement at fn. 1 of the Petition to the effect that virtually all union contracts provide for grievance arbitration is not entirely accurate. There are many (particularly so-called "short form" contracts in the construction industry) which do not provide for either grievance procedures or arbitration. There have been a number of CBAs in California over the years which, while providing arbitration of some issues, specifically reserve to the California Labor Commissioner the right to hear and adjudicate claims involving Labor Code statutes.

[5]Recovery of wages represented by a non-sufficient funds check; recovery of employees' work tools, or recovery of damages for the loss of employees' work tools under the control of the employer are examples of actions which would not be precluded by the policy.

[6]The Labor Commissioner has repeatedly brought actions on behalf of workers employed under the terms of collective bargaining agreements to recover state mandated minimum wages or to enforce the provisions of the state law banning discrimination or retaliation in the terms and conditions of employment.

the terms of a collective bargaining agreement is grounded on the firm policy of the State of California as announced in the case of *Plumbing, Heating and Piping Council of Northern California v. Howard, supra*:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the *application or interpretation* of an existing collective bargaining agreement." *Plumbing, Heating, Etc. v. Howard, supra*, 53 Cal.App. 3d 828 at 835, citing 29 U.S.C. §173(d). (Emphasis in original)

California's public policy in this regard is a mirror reflection of the principle announced by this Honorable Court in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962), applied in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) and reiterated in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988):

> "If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute." *Lingle v. Norge, supra*, 486 U.S. at 405-406.

It is this long-standing policy of the California Labor Commissioner which is attacked here. The correct question before this Honorable Court, accurately put, is not whether a state agency may refuse to enforce state wage and hour law for union workers because they exercise their federally-protected right to bargain collectively. The question addressed by the Ninth Circuit Court of Appeals was whether a state

agency, based upon the dictates of a state law, may decline to adjudicate a claim which, in the opinion of the state agency, requires, under the dictates of state law, the application and/or interpretation of a collective bargaining agreement which contains an arbitration agreement.

B. *Facts*

In January, 1990, Karen Livadas, a grocery clerk employed by Safeway Stores was terminated by her employer. Ms. Livadas had been employed under the terms of a collective bargaining agreement between Safeway Stores and the United Food and Commercial Workers, AFL-CIO.

The collective bargaining agreement under which Livadas was employed contained two general employee classifications (Food and Non-Food or General Merchandise) and provided for eleven separate subclassifications in each of the general classifications. The union contract contained bonus pay, shift differential, termination pay[7] and overtime compensation[8] provisions.

In addition to the above, the facts reflect that the collective bargaining agreement also contained other provisions which would necessarily require interpretation in order to reach the conclusion that the wages were, in fact, "due" or

[7]The CBA provided at §3.2 that if an employee is not given specified notice of termination, the employee must be given the equivalent pay. This pay in lieu of notice provision does not operate, however, if the discharge is for "cause".

[8]The CBA contained premium pay provisions which differ substantially from the provisions of the California minimum requirements. The premium pay provisions do not appear to rely simply upon the number of hours an employee works but upon such factors as the day of the week the work is performed or whether the work was performed during a scheduled meal period.

whether the failure to pay the wages was "willful"[9]. Livadas alleged that the largest portion of the sum due to her at time of termination represented vacation wages. The CBA provides at §11.5 that the parties were bound by the terms of the Northern California Retail Clerks Union-Employers Vacation Fund and Plan. It is unclear whether these vacation wages were subject to the arbitration provisions of the collective bargaining agreement. However, the California Labor Commissioner would have no jurisdiction over this "plan" if it were determined, as appears likely, to be subject to ERISA. (See 29 U.S.C. 1144(a)) Additionally, the provisions of California Labor Code §227.3 would require that the inquiry regarding the vacation wages be based entirely on the terms of the collective bargaining agreement, not state law.[10]

In the opinion of the state officials, a fair reading of the provisions of Labor Code §203 which require a finding that failure to pay wages <u>due</u> at termination be <u>willful</u>, made it necessary to address (i.e., interpret and/or apply) each of the

[9]The definition of the term "willful" as it is used in Labor Code § 203, is found at Title 8, California Code of Regulations ("C.C.R."), §13520:

> "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> "a) Good Faith Dispute. A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute'."

[10]Labor Code §227.3, generally, requires the Labor Commissioner to apply unique vesting rules and disregard any forfeiture provisions in an employer's vacation pay policy. (See *Suastez v. Plastic Dress-Up* (1982) 31 Cal.3d 774; 647 P.2d 122; 183 Cal.Rptr. 846) However, the provisions of Labor Code §227.3 do not apply if the vacation pay policy is contained in a collective bargaining agreement.

above-described provisions of the collective bargaining agreement in determining the validity of Livadas' claim for relief.

II.
REASONS FOR DENYING THE WRIT OF CERTIORARI

A. *The Ninth Circuit's Decision Reflects Current Law*

The Ninth Circuit's decision in this case parallels the decisions of this court which have "mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge, supra,* 486 U.S. at 404.

The complaint by Livadas, as described by the Ninth Circuit decision, alleged that the Labor Commissioner's policy "not to adjudicate any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause" is preempted by federal labor law[11]. As the Ninth Circuit noted, Livadas contended that the California Labor Code sections which were applicable "provide independent state rights and do not concern the interpretation or application of collective bargaining agreements."[12]

On the other hand, the Labor Commissioner, in reviewing the facts to establish his jurisdiction under the state law, determined that "Labor Code Section 203 requires that the wages continue at the 'same rate' until paid. In order to establish what the 'same rate' was, it is necessary to look to the collective bargaining agreement and 'apply' that agree-

[11]*Livadas v. Aubry*, 943 F.2d 1140, 1144 (9th Cir.1991)

[12]*Id.*, at 1144

ment."[13] The Labor Commissioner, in dismissing the complaint for lack of jurisdiction, also stated that "[T]he [California] courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit."[14] The decision by the Labor Commissioner to dismiss the claim was based upon the Commissioner's application of state law as that law had been interpreted by the California courts.

The Ninth Circuit decision explained that California Labor Code §229 was a "perfectly valid state statute" which the California courts have interpreted as "prohibit[ing] the Labor Commissioner from assuming jurisdiction to enforce claims for wages arising under collective bargaining agreements." This result, the Ninth Circuit concluded, is not only permissible under federal law but is "required under federal law." Any California law which permitted one of its agencies or its courts to adjudicate disputes arising under collective bargaining agreements containing arbitration clauses would be preempted. Labor Code §229 simply codifies the requirement that the California Labor Commissioner may not assume jurisdiction which would require the application or interpretation of the terms of a collective bargaining agreement—a codification which "recognize[s] the importance of both collective bargaining agreements and arbitration"[15].

[13]*Id.*, at 1144.

[14]The Labor Commissioner relied not only upon the case of *Plumbing, Heating, etc. v. Howard, supra,* 53 Cal.App. 3d 828, but upon two subsequent, unreported California Superior Court Appellate Department cases involving the Labor Commissioner which held, specifically, that where the employment was covered by a CBA, waiting time penalties pursuant to Labor Code §203 could not be ascertained without interpreting or applying the terms of the collective bargaining agreement.

[15]*Plumbing, Heating, etc. v. Howard, supra,* 53 Cal.App.3d 828, 834-35.

As the Majority opinion below points out, Livadas does not contest the fact that the State Labor Commissioner does not have the jurisdiction to interpret or apply the terms of the collective bargaining agreement. Instead, Livadas contends that the Labor Commissioner misinterpreted the California state law in reaching the conclusion that the provisions of Labor Code section 201 and, in particular, section 203, require the trier of fact to interpret and apply the terms of the collective bargaining agreement in order to adjudicate her claim.

Since Livadas' contention, as the Ninth Circuit concluded, was that the Labor Commissioner misinterpreted state law, not federal law, her remedy was to seek a writ of mandate in the California courts to correct the supposed error.

The Ninth Circuit directed Livadas to the case of *Baker v. Aubry*, (1989) 216 Cal.App.3d 1259, *review denied*, Mar. 15, 1990, *cert. denied*, ___ U.S. ____, 111 S.Ct. 66, 112 L.Ed.2d 40 (1990) and suggested that her application for a writ should allege that the Labor Commissioner misinterpreted the requirement of California State Labor Code § 229. In her Petition for Writ of Certiorari, Livadas refers to the suggestion by the Ninth Circuit that her remedy is an application for a writ of mandate in the state courts as an extension of the abstention doctrine. In fact, what the Ninth Circuit suggests is not an extension of the doctrine of abstention, but a classic application of that doctrine.

In response to the suggestion that the proper remedy for the alleged error she attributes to the state Labor Commissioner is a writ of mandate in the state court, Livadas, in the Petition for Writ of Certiorari filed with this Honorable Court, denies that such a remedy is available, relying on the case of *Painting & Drywall Work Preservation Fund v. Aubry* (1988) 206 Cal.App.3d 682, to support that erroneous

position. The *Painting & Drywall* case, of course, has nothing to do with the exercise of jurisdiction. The case involves the right of the Commissioner, in investigating complaints filed with the Division's Field Enforcement Unit (See Labor Code § 90.5(a)), to exercise its discretion to "ensure the available resources will be concentrated in industries, occupations, and areas in which employees are relatively low paid and unskilled, and those in which there has been a history of violations."

On the other hand, the case of *Baker v. Aubry, supra*, which the Ninth Circuit relied upon, is directly on point. There the Labor Commissioner, faced with a challenge to his jurisdiction based on the fact that the complainant Baker's employment was subject to Rule 347 of the New York Stock Exchange, dismissed the complaint based on this Honorable Court's decision in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1986). The basis for the dismissal was, of course, the unique nature of Baker's employment which was subject to the rules of the New York Stock Exchange and the existence of the arbitration agreement required by that employment. Such employment had been determined to be subject to the Federal Arbitration Act.

Nancy Jane Baker, the complainant in *Baker v. Aubry*, upon the dismissal of her complaint by the Labor Commissioner, sought a writ of mandate in the state Superior Court which was denied. Baker appealed that denial to the Court of Appeal, First District. After again being denied the right to have her claim heard before the Labor Commissioner, Baker subsequently sought certiorari which this Court denied. The Labor Commissioner in the *Baker v. Aubry* case exercised exactly the same analysis in reaching the decision to dismiss as that exercised in the instant case. The only differences were that in *Baker v. Aubry* the statutory arbitration requirement arose under federal law (the Federal Arbitration Act) and the

question of jurisdiction was not raised until the hearing before the Labor Commissioner. In the instant case, the agency dismissed *sua sponte* based on the facts presented by the complainant, Karen Livadas.

B. *Petitioner's Illogical Alternative Would Require Review Of The State Labor Commissioner's Decisions Regarding Jurisdiction Be Conducted By The Federal District Court*

Though left unsaid by Petitioner, there is only one logical alternative to the Ninth Circuit's decision. The current Labor Commissioner policy recognizes the state agency's right, in the first instance, to establish its jurisdiction by determining whether any complaint requires the application and/or interpretation of the terms of a collective bargaining agreement pursuant to state law (Labor Code §229). That agency decision is subject to review by writ of mandate in the state courts. The only alternative is to make that determination subject to review, on a case-by-case basis, in the federal courts.

In this particular case, the federal District Court decision, reversed by the Ninth Circuit, found that the actions of the Labor Commissioner in interpreting the provisions of Labor Code §229 involved a federal question. The District Court enjoined the Labor Commissioner to "enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause." The order of the District Court is premised on the finding by the District judge that "[T]he simple question of whether the [state] statute was violated can be determined wholly independently from the CBA"[16]. This decision by the District Court constituted a review of the Labor Commissioner's determination of the case based upon the Labor Commissioner's application of the state law[17].

The result of the District court's ruling, of course, is to force the California Labor Commissioner to accept all complaints filed by employees in the State of California alleging disputes concerning those Labor Code sections. The Labor Commissioner would no longer enjoy the discretion of determining his or her own jurisdiction in this area based upon the Commissioner's interpretation of state law. The parties could no longer expect the Labor Commissioner to base his or her jurisdiction on an interpretation of state law (Labor Code §229) where the employer raises the defense that a "good faith dispute" regarding whether the wages were due under the employment contract existed. However, inasmuch as the question of the jurisdiction of the Labor Commissioner would, according to the federal District Court, continue to be subject to the federal law, either party could look to that court to review the actions of the Labor Commissioner in regard to jurisdiction.

Thus, employers who felt that the Commissioner's acceptance of jurisdiction in a particular case deserved further review could look to the federal District Court to perform that service.

---

[16]Neither the District Court nor the dissent in the Ninth Circuit case furnish any bright line test which the Labor Commissioner might utilize to determine its jurisdiction in this situation. In fact, aside from generalities which clearly do not address the question of the "willfulness" of the employer's actions, the District Court and the dissent offer no guidance in this area.

[17]So sure was the District Court judge of the facts and law in the case, the Labor Commissioner was "ordered to pay as compensatory damages to the plaintiff, Karen Livadas, the full value of her wage claim in the event that the claim is held time-barred by the California State Courts."

C. *The Cases Cited By Petitioner Are Easily Distinguished*

Appellee cites several cases in an attempt to establish a conflict between results in other federal Circuit courts and the majority opinion rendered in the instant case. However, unlike the instant case, which hinges upon the application of a state statute consistent in all respects with federal law, which precludes state officials from determining state claims requiring the application or interpretation of a collective bargaining agreement, the cases cited by appellee deal with state laws inconsistent with federal policy. However, none of the cited cases, as discussed, *infra*, are inconsistent with the majority opinion.

1. *Rum Creek Coal Sales v. Caperton*

In the case of *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353 (4th Cir. 1991), the court was asked to review the West Virginia Trespass statute (W.Va. Code §61-3B-3) which provides that while persons entering property without permission is a criminal offense, the provisions of this law do not apply in a labor dispute. The Fourth Circuit noted that "[t]he ability to withstand a strike or to strike requires that the parties may resort to those laws not preempted by the NLRA. Part of the laws of West Virginia include laws against criminal trespass." Removing the protection of this law from the employer's reach is as much an obstruction of federal policy as if the state were to declare picketing illegal. *Rum Creek Coal Sales, supra,* at 365-366. The Fourth Circuit Court went on to point out that other states (including California) had adopted statutes which precluded imposition of criminal sanctions for trespass where the parties were engaging in "lawful labor union activities or activities subject to the regulation of the NLRA." *Id.*, at 356.

The Ninth Circuit's opinion in the instant case does not purport to deny access to the law to Livadas or any other

individuals who are members of a union or, even, to deny the right to access to all those under the terms of a collective bargaining agreement containing an arbitration clause. The opinion here simply states that the question of whether the claim requires the trier of fact to interpret or apply the provisions of a collective bargaining agreement is a question of state law which should be left to the state agency and, ultimately, the state courts. The question as to the need to apply or interpret the CBA in a particular case is indispensable to a determination of jurisdiction of the Labor Commissioner under state law. Review of that discretionary determination should be directed to the state courts.

The *Rum Creek Coal Sales* case clearly illustrates the differences between the facts in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) and the situation at issue here. In *Machinists* the Wisconsin Employment Relations Commission found the actions of the union violative of the Wisconsin statute which prohibited sit-in strikes. This Court held that neither the National Labor Relations Board nor the state could prevent the use of sit-ins as a tactical weapon because Congress intended that such activity fell within the purview of a legitimate "economic weapon" which is "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Machinists* 427 U.S. at 141. In the instant case, however, the application of the state law (Labor Code §229) does not preclude activity which is even arguably "neither protected nor prohibited" by the Act—the condition imposed by the state law in this case "is perfectly permissible under federal law. In fact, it is required under federal law, for if adjudicating the dispute would require interpreting a collective bargaining agreement, federal law would preempt the adjudication." *Livadas v. Aubry, supra*, 943 F.2d at 1146.

2. *Steelworkers v. Johnson*

In *Steelworkers v. Johnson*, 830 F.2d 924 (8th Cir.1987), the Steelworkers Union questioned the South Dakota Department of Labor's refusal to pay unemployment insurance benefits to certain unemployed workers because "the claimants do belong to Local 7044" while determining other "claimants" to be eligible because they were non-union in the right-to-work law State of South Dakota. The majority opinion in the Eighth Circuit case (heard *en banc*) held that, under the facts in that case, the state's reliance on the union membership of the applicant as a criteria for paying benefits was prohibited by section 7 of the NLRA. The decision of the State of South Dakota did not require any consideration of the terms and conditions of a CBA. The facts in the *Steelworkers* case, illustrate a direct interference with the right of the workers to be represented by a union. The State referee had focused his decision regarding eligibility for the benefits on the employee's union membership without distinguishing those union members who were willing to work despite the strike from those union employees who were unwilling to work because of the strike. *Steelworkers*, at 926. The Eighth Circuit encountered no trouble in finding the use of the criteria required by the state law to be discriminatory.

Again, it would appear, Livadas' reliance on this case evidences her failure to recognize that the Ninth Circuit decision in this case relies on the fact that she herself admits that the correct application of the Labor Commissioner's policy would be not only proper under federal law; but, in fact, required by federal law. The Labor Commissioner's policy does not, as Petitioner (and the dissent) alleges, hinge on membership in a union. The policy required the Commissioner to determine whether the claim by Livadas required, under state law guidelines, a discretionary determination involving the interpretation and application of the CBA. Re-

view of that decision is, according to the majority, properly left to the state courts.

3. *Beckwith v. United Parcel Service*

Reliance on the case of *Beckwith v. United Parcel Service*, 889 F.2d 344 (1st Cir.1989), illustrates Petitioner's misunderstanding of the Ninth Circuit decision. The First Circuit case did not address the exercise of discretion by the state agency. The facts in *Beckwith* require no interpretation or application of the collective bargaining agreement. The First Circuit simply held that the Maine statute which prohibits the execution of agreements providing for payroll deductions as a condition of employment is not preempted by the NLRB.

United Parcel argued that the state law which prohibited the type of payroll deduction was preempted when such deduction was specifically permitted by the terms of the collective bargaining agreement. The Court in *Beckwith*, in view of the recent decisions of this Court in *Fort Halifax Packing Co. v. Coyne* 482 U.S. 1 (1987) and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), found that argument totally unpersuasive.

The argument propounded by United Parcel, if carried to its logical conclusion, would allow the parties to collectively bargain away the state minimum substantive labor standards such as state-mandated minimum wage available to all workers whether employed under the terms of a collective bargaining agreement or not.

However, unlike the issue in this case, in order to establish the fact that Beckwith's pay was subject to payroll deduction, there was no need to review the terms of the collective bargaining agreement. It was only necessary to review either the employer's or the workers' payroll records. Unlike the facts in this case which require the trier of fact to find both

that the wages are due and the failure to pay the wages was willful, the trier of fact in the *Beckwith*-type case need not determine the wage paid but simply determine if the employee's payroll receipt evidenced an illegal deduction from the gross wages paid.

III.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals does not conflict with cases of either this Honorable Court or with those of any of the other circuits. The Circuit Court's decision is in concert with this Court's decisions which encourage parties to collective bargaining to utilize arbitration to resolve their differences. As the Ninth Circuit concluded, the State of California's adoption of Labor Code §229 is simply a codification of this Court's announced policy which holds that any state-law claim which depends on the interpretation or application of a collective bargaining agreement is pre-empted.

Since there exists no rationale for the granting of certiorari, the Court should deny the Petition.

Respectfully submitted,

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Supreme Court, U.S.
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No. 92-1920

IN THE
Supreme Court of the United States
October Term, 1993

KAREN LIVADAS,
Petitioner,

v.

LLOYD AUBRY, in his official capacity as Labor Commissioner for the State of California,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Commissioner creates a misleading impression by reciting specific provisions of Livadas's union contract, Opp. Brief at 6-7. The Commissioner did not disqualify Livadas because of any particular substantive term of her union contract. The agency issues a form rejection letter (App. 8a) solely because the applicant has a union contract with grievance arbitration, no matter what other provisions that agreement contains. *See* App. 25a.

The Commissioner is also wrong to argue, at Opp.

Brief 12-13, that federal relief in this case would require the federal courts to review all of his agency's eligibility decisions. As Judge Kozinski points out, the state agency has sole authority to decide the merits of Livadas's state-law claim; Livadas is only seeking injunctive relief against the Commissioner's threshold rule excluding applicants on the basis of their federally protected activity. App. 16a-17a.

The Commissioner cannot camouflage the federal significance of this practice by labelling it a "*sua sponte* dismissal on jurisdictional grounds." *See* Opp. Brief at 12. No matter how the Commissioner rationalizes this policy, the fact remains that California's labor preemption rules systematically bar union workers from state-law employment benefits, without any adversary proceedings.[1] Under these circumstances, the federal courts must exercise § 1983 jurisdiction when state agencies apply an "irrebuttable presumption" that penalizes applicants for their exercise of federal rights. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 487 (1983). Otherwise, the federal power asserted in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) will have no effect against local rules that conflict with federal labor law.

[1]The absence of adversary proceedings is also fatal to the Commissioner's suggestion that Livadas proceed against his agency in state court for a writ of mandamus. Unlike the stockbroker plaintiff in *Baker v. Aubry*, 216 Cal.App.3d 1259 (1989), Livadas was excluded without any hearing or taking of evidence. Such proceedings are a prerequisite to the exercise of administrative mandamus in the California courts, see Cal.Code of Civ.Pro. § 1094.5(a). In the absence of such a hearing, the California courts treat the Commissioner's refusal to proceed on a charge as an unreviewable exercise of prosecutorial discretion. *See Painting and Drywall Work Preservation Fund v. Aubry*, 206 Cal.App. 3d 682, 687 (1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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23 pp

QUESTION PRESENTED

Whether petitioner may sue the California Labor Commissioner for injunctive relief and damages under 42 U.S.C. 1983, for refusing to prosecute her state wage-and-hour claim based on her status as an employee covered by a collective bargaining agreement containing an arbitration clause.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. On January 2, 1990, petitioner, a union-represented employee covered by a collective bargaining agreement, was discharged from her position as a clerk at a Safeway store in Napa County, California.[1] On that date, she requested payment of all wages due her. The store manager refused, telling petitioner

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[1] Petitioner was represented by Local 373, United Food and Commercial Workers, AFL-CIO. Pet. App. 24a.

that he would mail her a check instead. Petitioner received that check three days later, on January 5. Pet. App. 2a.

Petitioner believed that Safeway's three-day delay in payment violated California law. Section 201 of the California Labor Code provides: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Cal. Lab. Code § 201 (West 1989). Section 203 provides: "If an employer willfully fails to pay * * * in accordance with [Section] 201 * * * any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid." Cal. Lab. Code § 203 (West 1989). On January 9, petitioner filed a claim with the California Division of Labor Standards Enforcement (DLSE) seeking a penalty payment from Safeway pursuant to Section 203. Pet. App. 2a.

Respondent is the California Labor Commissioner and the head of DLSE. He is authorized by Section 98.3(a) of the state Labor Code (Cal. Lab. Code § 98.3(a) (West 1989)) to prosecute actions to collect penalties on behalf of individuals who are "financially unable to employ counsel and * * * have claims which are valid and enforceable" under the California Labor Code. Pet. App. 2a-3a. On February 7, 1990, DLSE sent petitioner a letter declining to prosecute her claim. The letter stated (*id.* at 8a):

> It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.[2]
>
> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

2. a. On February 16, 1990, petitioner filed an action in federal district court against respondent in his official capacity as Labor Commissioner under 42 U.S.C. 1983, seeking injunctive and declaratory relief and damages based on respondent's refusal to prosecute petitioner's claim against Safeway for the penalty prescribed by Section 203 of the state Labor Code. Pet. App. 3a. As described by the district court (*id.* at 24a-25a), the complaint alleged that DLSE maintains "[an] agency policy of discrimination in the enforcement of the California Wage and Hour Law against employees who work under collective bargaining agreements which have arbitration clauses." That policy, petitioner alleged, "denied her access to the investigatory, prosecutorial, and remedial resources provided under [the] California Labor Code * * * for the sole reason that she is an em-

---

[2] Cal. Lab. Code § 229 (West 1989) states (Pet. 3):

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

ployee" covered by such an agreement. *Id.* at 25a. DLSE's policy violates Section 1983, petitioner urged, since it denies her benefits merely because she has engaged in federally protected rights to "participation in a labor union and in collective bargaining." *Ibid.*

Respondent admitted in the district court that DLSE's policy "is to enforce Labor Code [Sections] 201 and 203 for all employees except for those whose work is governed by [collective bargaining agreements] containing binding arbitration clauses." Pet. App. 25a. He defended DLSE's policy on the ground that it is required by federal labor-law preemption doctrine. Respondent explained that "[s]ince damages under [Section 203] are determined in terms of wages, which are established by the [collective bargaining agreement] * * * enforcement of the statute would entail interpretation of the [agreement]." *Id.* at 26a.

b. The district court granted summary judgment for petitioner. Pet. App. 23a-24a. The district court stated that, under this Court's decision in *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), a governmental state or local policy that burdens or penalizes employees' exercise of rights granted by the National Labor Relations Act (NLRA) is preempted by the NLRA. Moreover, under *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*), an employee so affected by such a policy may obtain injunctive relief and damages from the governmental unit under Section 1983. Pet. App. 27a-32a. The district court concluded that the NLRA affords petitioner the right to negotiate, through her union, a

collective bargaining agreement containing an arbitration clause, and that DLSE's policy of granting benefits provided by state law to all employees except those who work under such a labor contract infringes upon that federal right. *Id.* at 32a-38a.

Finally, the district court rejected respondent's defense (reflected in DLSE's February 7 letter to petitioner) that DLSE was "preempted" from prosecuting petitioner's claim by Section 229 of the state Labor Code, as interpreted by the California courts.[3] The district court held that preemption doctrine is a matter of federal, not state, law, and that, insofar as Section 229 is interpreted as going beyond the requirements of federal preemption doctrine, it is invalid. Pet. App. 10a-11a. Relying on *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), and *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the district court concluded that petitioner's state-law claim for a penalty payment from Safeway was not preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185. "The simple question of whether the statute was violated," the district court found, "can be determined wholly independently from the [collective bargaining agreement]. * * * It requires reference only to a calendar, not to the [agreement], to determine that the statute was violated and penalties are due." Pet. App. 41a.

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[3] In *Plumbing, Heating and Piping Employers Council of Northern California* v. *Howard*, 126 Cal. Rptr. 406 (Cal. Ct. App. 1975), the state appellate court held that Section 229 "precludes the Labor Commissioner from hearing and enforcing a claim for collection of alleged due and unpaid wages by an employee who belongs to a union which has entered into a collective bargaining agreement which contains an arbitration clause." 126 Cal. Rptr. at 409.

Accordingly, the district court, *inter alia*, issued an injunction requiring respondent to enforce Sections 201 and 203 "without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause." Pet. App. 49a. It ordered respondent to institute an action on petitioner's behalf in the California courts under Section 203, and to pay her the full value of her claim in the event that the state courts found her claim time-barred. *Ibid.*

3. A divided panel of the Ninth Circuit reversed. The panel majority agreed with the district court that petitioner has a right under the NLRA to engage in collective bargaining and that she has a cause of action under Section 1983 to obtain a remedy if she has been deprived of that right by the State. Pet. App. 7a. The majority held, however, that DLSE's policy does not "implicate[] [petitioner's] federal rights at all." *Id.* at 10a. The court understood Section 229, as interpreted by the state courts, "to preclude the adjudication of claims that would be preempted by federal labor law." *Id.* at 9a. For respondent to so limit his enforcement of Section 203 claims, the court concluded, "is perfectly permissible under federal law." *Id.* at 11a. The court further stated that, even if respondent were mistaken in deciding that petitioner's claim is preempted by federal law (an issue which the majority did not reach), he did not thereby deprive her of rights under the NLRA. That is because respondent's refusal to prosecute petitioner's claim amounted, at most, to a misapplication of Section 229, and "[a] misinterpretation of a perfectly valid

state statute * * * does not provide grounds for federal relief." *Id.* at 12a.[4]

The court of appeals concluded that "[t]o hold that [petitioner] is entitled to federal relief in this case would require us to hold that she is entitled under the NLRA to a correct interpretation of California law regarding enforcement of [Section] 203 claims." Pet. App. 12a. The court stated that Congress did not intend the NLRA to confer any such entitlement upon unionized employees. The court explained that such an entitlement would "place employees who bargain collectively in a better position than those who do not because it gives them an extra avenue of redress for the erroneous determination of state law." *Id.* at 13a. Congress could not have intended that result, said the court, "[b]ecause [Section] 7 of the NLRA gives employees the right to *refrain* from bargaining collectively as well as the right to do so." *Ibid.* (emphasis in original).

In addition, the panel majority was "persuaded by the more general policies of federal labor law" that "Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted." Pet. App. 13a-14a. "If anything," the court reasoned, "Congress would presumably want state officials to defer to arbitration * * * if a claim even arguably is intertwined with consideration of a collective bargaining agreement." *Id.* at 14a.

Judge Kozinski dissented. He noted that respondent's refusal to process petitioner's claim because she

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[4] The appropriate avenue of relief in these circumstances, the court stated, is for petitioner to seek a writ of mandate against respondent in the California courts. Pet. App. 12a.

was covered by a collective agreement "is clearly discrimination based on an exercise of protected federal rights." Pet. App. 17a. In his view, it does not matter that respondent's policy was based on his interpretation of state law: "[t]he point is, [respondent] is applying state law and his own policy in a way that impinges on protected federal rights." *Ibid.* Therefore, and contrary to the panel majority's view, it was necessary for the court to determine whether Section 301, 29 U.S.C. 185, actually preempts resolution of petitioner's claim by the state agency, not whether the state policy was reasonably intended to avoid the preemptive force of Section 301. *Id.* at 17a-18a.

Judge Kozinski then concluded, in agreement with the district judge, that, under *Lingle*, petitioner's claim is not preempted by Section 301. "A court could find that [Safeway] did not pay [petitioner] immediately upon termination—and thus violated the statute—without ever looking at the [collective bargaining agreement]." Pet. App. 19a. The dissent also found that respondent's refusal to enforce wage-and-hour claims under these circumstances impermissibly burdens the NLRA rights of employees in petitioner's position in two ways. First, it denies only employees "who exercise their federal labor rights" the right to have the Commissioner press their state labor law claims for them free of charge. *Id.* at 20a. Second, it impedes unionization efforts by giving employers a plausible basis for telling employees during election campaigns that if they "vote for the union," then "the state Labor Commissioner [will] abandon[] you." *Id.* at 21a & n.2.

DISCUSSION

The court of appeals correctly acknowledged (Pet. App. 7a) that the NLRA gives petitioner "a right to engage in collective bargaining, and Section 1983 therefore provides a remedy for a deprivation of that right." See *Golden State II*, 493 U.S. at 108-109. The panel majority erred, however, in concluding that respondent did not burden petitioner's rights under the NLRA by refusing to prosecute her claim under the California Labor Code based on her status as an employee covered by a collective bargaining agreement. If allowed to stand, this decision will have a detrimental effect on the ability of employees covered by collective bargaining agreements to enjoy protections guaranteed to all workers under state law. The United States, and the National Labor Relations Board in particular, have an important interest in insuring that States do not discriminate against employees who exercise their rights under the NLRA, and that States enforce their laws in a manner consistent with NLRA and Section 301 preemption principles. The court of appeals' decision misapplies Section 301 preemption principles and is inconsistent with decisions of this Court holding that state action that impairs rights protected by the NLRA is preempted by direct operation of the Supremacy Clause. Review by this Court therefore is warranted.

1. This Court has made clear that state action that impairs rights created by the NLRA is barred by direct operation of the Supremacy Clause. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967); see also *Brown* v. *Hotel Employees*, 468 U.S. 491, 503 (1984); *Hill* v. *Florida*, 325 U.S. 538 (1945). For example, in *Nash*, the Florida Indus-

trial Commission interpreted a state law that barred individuals unemployed due to a labor dispute from receiving unemployment benefits as applying to any individual who filed an unfair labor practice charge with the National Labor Relations Board. The Court found that the "financial burden" imposed by the State's rule, "like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." 389 U.S. at 239. It therefore concluded that the Florida law, as applied, violated the Supremacy Clause because the State could not "defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Ibid.*

Here, too, the State has denied petitioner a state benefit—the prosecution of a wage claim—simply because she has exercised a right granted by the NLRA. Section 7 of the NLRA, 29 U.S.C. 157, guarantees employees the right to bargain collectively, and Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to coerce employees in the exercise of that right. There is no doubt that an employer could not deny an employee a benefit to which she was otherwise entitled simply because she was covered by a collective bargaining agreement. A State cannot do so either.[5]

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[5] Petitioner asserts (Pet. 7-8, 11) that this case, like *Golden State I*, involves *Machinists* preemption. See also Pet. App. 37a-38a (district court opinion). *Machinists* preemption precludes States from regulating in areas that Congress intended to be "free from all regulations, whether state or federal." *Building Trades Council* v. *Associated Builders*, 113 S. Ct. 1190, 1195 (1993); see also *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 749-751 (1985); *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). On the contrary, the state action in this case is barred not because it intrudes into an area that Congress intended to leave unregulated, but because "of an actual conflict with [Section] 7." *Brown* v. *Hotel Employees*, 468 U.S. at 501.

In any event, it is immaterial to our analysis whether preemption is based on actual conflict with Section 7 or on principles of preemption as defined in the *Machinists* case. In *Golden State II*, the Court explained that a Section 1983 suit could be predicated, as here, on state interference with rights "explicitly set forth in [Section] 7," or, as in *Golden State I*, on state interference with "the right to make use of 'economic weapons,' not explicitly set forth in the [NLRA], free of governmental interference." 493 U.S. at 110-111.

2. Despite the fact that petitioner was denied a state benefit simply because she was covered by a collective bargaining agreement with an arbitration provision, the court of appeals found no deprivation of a federal right. The court's reasoning is flawed in several respects.

a. The court of appeals attempted to characterize this case (Pet. App. 11a) as one in which petitioner "does not challenge the condition the Commissioner places on his enforcement" of wage-and-hour claims —that is, that enforcement of such claims "not require the interpretation or application of a collective bargaining agreement"—but only "the application of the rule to her case." In refusing to process petitioner's claim, however, respondent did not make an individualized determination that enforcing petitioner's claim would require interpretation of a collective bargaining agreement. Rather, he followed a blanket rule, articulated by the California courts, of not

processing the claim of any employee covered by a collective bargaining agreement containing an arbitration clause. The district court found that "the policy of the DLSE is to enforce Labor Code §§ 201 and 203 for all employees except for those whose work is governed by CBAs containing binding arbitration clauses," Pet. App. 25a, and the court of appeals did not specifically disturb that finding. Indeed, it cited with approval (*id.* at 9a) the opinion in *Plumbing, Heating and Piping Employers Council of Northern California* v. *Howard*, 126 Cal. Rptr. 406 (Cal. Ct. App. 1975), in which the state court held that Section 229 of the California Labor Code precludes the Labor Commissioner from enforcing an unpaid wages claim "by an employee who belongs to a union which has entered into a collective bargaining agreement which contains an arbitration clause." 53 Cal. App. 3d at 832-833, 126 Cal. Rptr. at 409.

b. But even if, as respondent contends (Br. in Opp. 4-8), petitioner's claim can be viewed as a challenge to respondent's allegedly overinclusive or erroneous application of a statute that precludes processing claims that are preempted by federal law (because they involve the interpretation of a collective agreement), petitioner would still have a cause of action under Section 1983 against respondent for interfering with the exercise of her rights under the NLRA. We do not dispute that a State would be entitled to adopt a rule of refusing to process claims that come within the scope of this Court's doctrine of federal labor law preemption under Section 301 of the LMRA, as articulated in *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), and other cases [6]; however, the Commissioner simply does not follow such a practice here. In applying Section 229 of the state Labor Code, the Commissioner has in fact adopted a general rule that exceeds the scope of federal preemption: he does not enforce wage-and-hour claims of individuals covered by collective agreements containing an arbitration clause. Contrary to respondent's assertion, Section 301 of the LMRA does not preempt this broad category of claims. As the dissent correctly observed (Pet. App. 19a), it is not necessary to refer to the collective agreement to determine whether Safeway paid petitioner immediately upon termination as required by state law. Nor is preemption required because it might be necessary to refer to the collective bargaining agreement to determine the amount of wages due an employee in a wage-and-hour dispute. Cf., *e.g.*, Pet. App. 8a, 26a, 43a. See also Section 203

[6] The Court in *Lingle*, 486 U.S. at 409-410, ruled that a state law claim is preempted under Section 301 of the LMRA only if resolution of the claim involves interpreting a collective bargaining agreement. See also *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 220 (preemption applies when "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."). Even though the employee in *Lingle* was covered by a collective bargaining agreement containing a "just cause" discharge clause, the Court held that a state tort claim of retaliatory discharge was not preempted because its resolution involved "purely factual questions" pertaining to the conduct of parties and "does not require construing the collective-bargaining agreement." 486 U.S. at 407. The Court emphasized that Section 301 preemption "merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Id.* at 409.

of the California Labor Code (measure of damages is the "same rate" that the employee was receiving when discharged). As *Lingle* made clear, 486 U.S. at 413 n.12:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. * * * In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted.

Because claims such as petitioner's are not pre-empted under Section 301, the DLSE's policy, as applied by the Commissioner, amounts to a categorical refusal to enforce wage-and-hour claims of individuals covered by collective bargaining agreements that are not in fact preempted under federal law, while at the same time enforcing similar claims for the benefit of other employees not covered by such agreements. By according less favorable treatment to individuals based on their status as employees covered by collective bargaining agreements, the State has in effect discriminated against them because of the exercise of their rights under the NLRA. The fact that the discrimination might be characterized as arising from an "error" in applying a statutory scheme that purports to coincide with the scope of federal preemption does not affect the analysis in this case. For, if the error is based on a misconception of the requirements of federal law and thus systematically results in abridging federally protected rights, the facial validity of the State's general rule does not excuse the

State's categorical error in applying that rule.[7] Rather, all that matters is that the Commissioner has applied state law to withdraw important protections from an entire group of individuals on the basis of their exercise of federally protected rights.

3. The court of appeals' decision in this case is inconsistent in principle with decisions in other circuits. In *Rum Creek Coal Sales, Inc.* v. *Caperton*, 971 F.2d 1148 (1992), the Fourth Circuit, relying on this Court's decision in *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), and the *Golden State* cases, enjoined the State's policy of not arresting picketers trespassing on a coal mine operator's property during a strike. State officials defended that policy on the au-

[7] Even if the preemption rationale for DLSE's policy, as interpreted by the court of appeals, might conceivably permit the Commissioner to pursue the wage-and-hour claims of *some* individuals covered by collective bargaining agreements (*e.g.*, those covered by agreements that do not dictate wages), the pattern of enforcement dictated by such a policy would still give rise to a cause of action under the *Golden State* cases, if, as here, the Commissioner was refusing to process a category of claims that is not in fact preempted. A policy that systematically results in the enforcement of *all* claims of eligible employees who are not covered by collective agreements, but of only *some* claims of employees covered by such agreements, would impermissibly burden the right to bargain collectively under the NLRA, because the Commissioner's less favorable treatment would be triggered by an employee's having exercised his Section 7 rights. In any event, a policy of not enforcing wage-and-hour claims for employees covered by collective bargaining agreements that determine wage rates, see Pet. App. 8a, is tantamount in practice to a rule of non-enforcement for all employees covered by collective bargaining agreements for the simple reason that such agreements customarily cover wages and hours.

thority of the state "Neutrality Statute," which barred the state police from "aid[ing] or assist[ing] either party" to "any labor trouble or dispute between employer and employee." 971 F.2d at 1150. The court acknowledged that the state statute placed a facially neutral and permissible condition upon the ability of the parties to a labor dispute to claim the benefit of the services of the state police. It nonetheless held that, by interpreting the Neutrality Statute as requiring state officials to "allow[] * * * strikers to * * * prevent[] ingress and egress into [private] property," 971 F.2d at 1154, the State applied the statute in a manner that was neither required nor permitted by federal labor law. The court first explained that the State's interpretation of the statute was not required by the preemption doctrine articulated by this Court in *Machinists*. The court of appeals observed that, although federal labor law creates "a free zone from which all regulation [of labor activity], whether state or federal, is excluded," 971 F.2d at 1153, it nevertheless "allows state governments to restrict labor activity that involves 'obstructing or attempting to obstruct free ingress or egress to and from * * * property.'" *Ibid.* The court then held that the coal mine operators had a cause of action under the *Golden State* cases because the State's application of the Neutrality Statute to bar state officials from enforcing the law against the strikers under those circumstances undermined the coal company's "rights to stay in business and withstand a strike" guaranteed under federal labor law, and thus ran contrary to the principles of neutrality established in *Machinists*. 971 F.2d at 1154.[8]

[8] The court of appeals attempted to distinguish *Rum Creek Coal Sales* by characterizing it as a case "where the state's

Analogously, in this case, the Labor Commissioner's categorical refusal to prosecute wage-and-hour claims of employees covered by collective bargaining agreements containing arbitration clauses is neither required nor permitted under federal labor law. The Commissioner's policy is not dictated by federal preemption principles, and it undermines employees' federally guaranteed rights to bargain collectively by penalizing the exercise of those rights.

The decision in *United Steelworkers* v. *Johnson*, 830 F.2d 924 (8th Cir. 1987) (en banc), is also at odds with the approach of the Ninth Circuit in this case. There, the court enjoined the state Secretary of Labor from denying unemployment benefits to union employees while granting benefits to their non-union co-workers in connection with the same labor dispute. The court acknowledged that the state statute, which prescribed an "able and willing to work" eligibility standard for unemployment benefits, was valid and could be applied to employees participating in a labor dispute, but it nonetheless held that the State had "failed to apply this test in a neutral, nondiscriminatory manner" by presuming that no union members,

excepting labor disputes from its trespass law cut too broad a preemption path." Pet. App. 14a-15a n.2. However, that captures the essence of petitioner's claim as well, since she alleges that the State's non-enforcement policy under its statutory scheme trenches on Section 7 rights by virtue of cutting "too broad a preemption path." Respondent discusses (Br. in Opp. 14-15) a Fourth Circuit opinion in an earlier phase of the *Rum Creek Coal Sales* litigation, 926 F.2d 353 (4th Cir. 1991), in which the court granted a preliminary injunction against enforcement of the state statutes at issue, but did not reach the merits of the permissible application of the Neutrality Statute. See 971 F.2d at 1152 (summarizing previous opinion).

as opposed to non-members, would be willing to work despite the labor dispute. 830 F.2d at 928-929. Analogously, in this case, respondent has failed to apply the California Labor Code in a nondiscriminatory manner by adopting the unwarranted assumption that every wage-and-hour claim of an employee covered by a collective bargaining agreement containing an arbitration clause is unenforceable under principles of federal labor law preemption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court, U.S.
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No. 92-1920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KAREN LIVADAS,
Petitioner,
v.

LLOYD AUBRY, in his official capacity as Labor Commissioner for the State of California,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

The Service Employees International Union, AFL-CIO, CLC respectfully submits this brief as *amicus curiae* in support of Karen Livadas's petition for certiorari.

INTEREST OF AMICUS CURIAE

The Service Employees International Union (SEIU) is a labor union with over one million members in North America, including over 280,000 members in California. It is the fourth largest union in the AFL-CIO.

The SEIU urges the Court to grant certiorari because the Ninth Circuit's decision will have a chilling effect on union organizing among the unskilled service workers the

SEIU seeks to represent. Most of the SEIU's organizing occurs in traditionally low-wage and union-free service industries. The SEIU has 400,000 members employed in health care, including hospital aides, home care workers, and nursing home attendants. An additional 185,000 SEIU members work in building services, typically as janitors or window cleaners. Even with collective bargaining agreements, employees in these industries often work under terms and conditions very close to the statutory minimum.

Lower-wage service employees like janitors and nurses aides rely on statutory labor standards as both an economic safety net and a floor from which they may bargain upward with their employers. The Ninth Circuit's decision allows states like California to make employees choose between the benefit of state-law employment regulations and their federal right to engage in collective bargaining. This extra cost of union activity will do substantial damage to the SEIU's organizing efforts. If the Ninth Circuit's decision remains the law, every new innovation in California employment law will create a new incentive against collective bargaining.

ARGUMENT

The petition for a writ of certiorari ought to be granted for these reasons:

(1) The Ninth Circuit's decision allows state agencies to alter the balance of bargaining power between unionized workers and their employers, by depriving unionized employees of substantive protections available to all other workers. This result of the Ninth Circuit's decision will have serious structural effects on federal labor policy contrary to this Court's decisions in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

(2) The decision below undermines uniform federal labor policy by allowing state agencies to apply state labor preemption rules at variance with federal law, contrary to this Court's decisions in *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986) and *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

I. THE DECISION BELOW DISRUPTS THE BALANCE OF COLLECTIVE BARGAINING POWER BETWEEN UNIONIZED WORKERS AND THEIR EMPLOYERS AND CHILLS ORGANIZING EFFORTS, ESPECIALLY AMONG LOW-WAGE WORKERS.

A.

This case presents the same question about state wage and hour law that this Court answered for federal wage and hour law in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In that case, the Court found that the existence of collective bargaining and grievance arbitration could not be used as an excuse to deprive unionized employees of their individual rights to enforce federal wage and hour law, the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq.

The *Barrentine* Court emphasized the separate purposes of the Labor Management Relations Act, "which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*," and the Fair Labor Standards Act, which "was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of "overwork" as well as "underpay." ' " [1] Thus, the *Barrentine* Court found that the

[1] *Barrentine*, 450 U.S. at 739 (emphasis in original; citation omitted).

exercise of federal collective-bargaining rights does not collapse the floor imposed by federal wage and hour law.

The strange result of the Ninth Circuit's decision in this case is that the principle of *Barrentine* does not apply for minimum standards created by *state* law. Such state employment protections have expanded dramatically in recent years in what one writer has called "a renaissance of rights for individual employees."[2] Each of the nine states in the Ninth Circuit has enacted a large variety of employment statutes whose availability to union members is now clouded by the Ninth Circuit's new direction in labor preemption law. The Addendum to this brief contains a partial catalogue of these statutory employment standards in the states in the Ninth Circuit. The Western states have created minimum conditions of employment like timely wage payment on discharge,[3] employee access to personnel files,[4] prohibitions against wage deductions for breakage or loss,[5] prohibitions against blacklisting former employees,[6] vesting rights in unused vacation pay on discharge, mandatory meal breaks and rest periods during the workday,[8] and mandatory leave

[2] Katherine Van Wezel Stone, The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System, 59 U. Chi. L. Rev. 575, 591 (1992).

[3] See, e.g., Alaska Stat. § 23.05.140; Ariz.Rev.Stat.Ann. 23-353(A); Haw.Rev.Stat. § 388-2; Nev.Rev.Stat. § 608.020; Or.Rev. Stat. § 652.140(2)-(5).

[4] See, e.g., Alaska Stat. § 23.010.430; Cal.Lab.Code § 1198.5; Wash.Rev.Code § 49.12.240

[5] See, eg., Haw.Rev.Stat. § 388-6; Nev.Rev.Stat. § 608.100.

[6] See, e.g., Ariz.Rev.Stat.Ann. § 23-1361; Cal.Lab.Code § 1050; Mont.Code Ann. § 39-2-801.

[7] See, e.g., Cal.Lab.Code § 227.3.

[8] See, e.g., Cal.Code of Regs. tit. 8 § 11010(11) and (12); Nev. Rev.Stat. § 608.019; Or.Admin.R. 839-20-050.

for jury and witness duty.[9] These state regulations are typically enforced by state agencies like California's Division of Labor Standards Enforcement.

The facts of this case involve a wage and hour regulation requiring immediate wage payment on termination with daily penalties for delay, Cal.Lab.Code §§ 201 and 203. Most states have similar statutes.[10] The purpose behind such regulations (though not obvious to everyone) is important. Many lower-wage workers live from paycheck to paycheck, and they cannot afford the uncertainty of waiting several days, weeks or months after termination until their employer decides to make a final payment of wages due.

California's Division of Labor Standards Enforcement (DLSE) has a policy of refusing to enforce these regulations for employees covered by collective-bargaining agreement that include grievance arbitration.[11] By reversing the district court's federal injunction against this policy, the Ninth Circuit's decision will affect much more than one grocery clerk's attempt to get the agency to enforce one provision of state law.[12] The Ninth Circuit now in fact holds that unionized workers have no federal remedy whenever a state official refuses to enforce a state employment regulation because of their union contract. Indeed, the Ninth Circuit goes out of its way to stress that state officials should refuse to enforce *any*

[9] See, e.g., Cal.Lab.Code § 230(c); Idaho Code § 2-216; Wash. Rev.Code § 13(2).

[10] *Individual Employment Rights Manual*, Lab.Rel. Rep. (BNA, 1990) at 519:107.

[11] *Livadas v. Aubry*, 749 F. Supp. 1526, 1528 (N.D. Cal. 1990).

[12] Even confined to Cal.Lab.Code §§ 201 and 203, the Ninth Circuit's decision affects the statutory final-paycheck rights of 280,000 SEIU members, and more than two million unionized employees, working in California.

employment regulation whenever the law "even arguably is intertwined with consideration" of a union contract.[13]

The harmful effects of this decision will be as great as the ability of state officials to detect "arguable" connections between their states' minimum labor standards and an employee's union contract. If Cal.Lab.Code §§ 201 and 203 are too close to the line to escape what Judge Kozinski calls the majority's "novel doctrine of quasi-preemption,"[14] then so is every other statutory labor standard listed in the Addendum. With the same logic, state labor agencies in Hawaii or Nevada could refuse to enforce state prohibitions against docking employees' wages for breakage, reasoning that such laws entail "the interpretation or application of a union contract." State officials will now have great incentive to follow California's exclusion policy, both as a way to lighten the state agency's workload and (where officials so choose) as a way to foster a union-free business environment.

By reopening the "argument" over this issue, the Ninth Circuit discards all the work this Court has done in cases like *Barrentine* to explain why individual employment rights do not conflict with collective bargaining. This Court has for many years rejected the argument that unionized employees can go to arbitration to vindicate their statutory rights because, as the District Court noted in this case, the "arbitrator may base her decisions solely upon the terms of the [collective bargaining agreement], and not upon public law. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 53-54 (1974). Since the CBA contains no term requiring wage payment immediately upon termination, and imposes no penalty for failure to make such timely payment, there would be no arbitrable issue."[15] Instead of defending this federal principle, the

[13] *Livadas v. Aubry*, 943 F.2d 1140, 1147 (9th Cir. 1991).

[14] 943 F.2d at 1148 (Kozinski, J., dissenting).

[15] *Livadas v. Aubry, supra*, 749 F. Supp. at 1537.

Ninth Circuit invites state officials to reach their own conclusions about this "complex[] . . . inherent tension," directing only that they exclude union workers if they are even arguably uncertain about the answers.[16] This agnostic attitude toward federal law disserves the Wagner Act and the workers that Congress intended to protect from penalty.

B.

When states exclude unionized workers from various wage and hour protections, they disrupt the balance of power in all aspects of the workplace relationship. In the first place, employees considering forming a union must now count the value of lost state labor benefits as a built-in cost of union membership. Union organizers will have to convince employees that they will be better off with a union even taking into account the automatic loss of state overtime, wage-and-hour, health and safety, and severance pay protection.

The cost-benefit tradeoff that results from the Ninth Circuit's decision will be a powerful weapon in the hands of the anti-union employer. As Judge Kozinski notes, an employer in California may now instruct its employees during a union election campaign: "Look here, if you vote for a union, the first thing that happens to you is that the state Labor Commissioner abandons you.'"[17]

Of course, unions may try to win back the lost benefits through the sheer economic force of collective bargaining. But this is a difficult task for unions representing unskilled, low-wage workers, who are more easily replaced than skilled workers in heavy industry. Even if the union is able to negotiate such benefits into its contract, the union must consume precious resources to win back the conditions which non-union employees enjoy as a matter of right. This means that the union is at a

[16] 943 F.2d at 1147.

[17] 943 F.2d at 1150 fn.2 (Kozinski, J., dissenting) App. 21a.

disadvantage in collective bargaining, since employers do not lose any of their comparable state-law rights when they begin collective bargaining. By contrast, the union must play catch-up ball, since it cannot negotiate a contract with grievance arbitration without automatically costing its members significant substantive state-law protections.

Of course, the employer does not have to agree to restore the lost benefit, and so it may never be won back, leaving union workers worse off than non-union workers—surely an anomalous result in the name of federal labor law preemption. The ultimate irony is that union workers may have to strike in order to secure the benefits that non-union workers are entitled to as a matter of state law. More likely, however, the union may simply decide that it is not worth it to fight for such a benefit, thus again leaving unionized workers at a permanent disadvantage vis-a-vis other workers. A result more anathema to the spirit and logic of the Wagner Act could not be imagined.

These are not new issues in this Court. This Court has consistently ruled that unionized workers should not be penalized for their collective bargaining activity by the loss of minimum state labor standards. "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimum standards on nonunion employers." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) The Court has already ruled that "employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co., Inc. v. Coyne, Director, Bureau of Labor Standards of Maine*, 482 U.S. 1, 21 (1987). Just as an employer comes into negotiations with the authority under state common law to run the workplace as

it wishes without having to bargain for it, workers come to collective bargaining with legal rights that underpin their bargaining position. *Id.*

If the Ninth Circuit's decision remains law, this Court's decisions in *Barrentine, Metropolitan Life* and *Fort Halifax* will lose much of their vitality.

II. THE DECISION BELOW UNDERMINES UNIFORM FEDERAL LABOR POLICY BY ALLOWING STATE AGENCIES TO APPLY STATE LABOR PREEMPTION RULES AT VARIANCE WITH FEDERAL LAW.

The Court should put to rest the Ninth Circuit's proposition that a state policy discriminating against union members is unreviewable if it is based on a state agency's "misinterpretation of a perfectly valid state statute" mirroring federal law. This is a paradigmatic case of a state actor discriminating against citizens on the basis of their exercise of protected federal rights under the National Labor Relations Act. Such discrimination is subject to federal injunctive relief under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). The Ninth Circuit's tolerance of such discrimination just because the agency bases it on a state labor preemption law not only "gut[s]" the operation of the rule in *Machinists* and *Golden State*, as Judge Kozinski put it, but threatens to proliferate state rules withdrawing employment benefits from unionized workers.

The very idea of state labor preemption law is meaningless. Under the Supremecy Clause of the federal Constitution, the operation of federal law does not need the endorsement or assistance of state legislatures. State laws that purport to repeat the principles of federal labor preemption are at best redundant and at worst mask rules that in fact undercut and violate federal law. For ex-

ample, this Court has ruled that a state may not impose supplementary penalties on labor law violators even in support of federal labor policy.[18] The same principle would apply even if a state codified general federal preemption rules into its state code and then claimed the authority to interpret that state statute to permit additional penalties against labor law violators.

State laws which establish minimum labor standards and purport to exclude unionized workers are disturbingly common.[19] Legislatures in these cases have apparently tried to anticipate federal preemption, but this is wholly unnecessary since federal preemption operates whether states recognize it or not. The explicit exclusion of unionized workers from state statutory minimums, even if well-intentioned, runs afoul of federal law in the opposite manner. If the Ninth Circuit's decision remains the law, state labor preemption statutes will certainly appear even more widely. Under the Ninth Circuit's decision, such state laws give agencies the flexibility to decide whether to extend the benefits of state law, without having to worry about interference from the federal courts. Taken to its logical conclusion, this trend will dismantle federal labor law altogether, leaving fifty versions of federal labor doctrine to develop separately in each of the states. If this happens, the protections of national labor law will depend only on the political climate of the state in which citizens exercise their federal labor rights.

The Court should put a stop to this destructive trend immediately, by granting certiorari in this case.

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[18] See *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986).

[19] See, e.g., Alaska Stat. § 23.10.430(b); Cal.Lab.Code § 227.3; Cal.Code of Regs. tit. 8 § 11010(3)(F); Mont.Code Ann. § 39-2-912(2); Nev.Rev.Stat. § 608.019(3)(b); Or.Admin.R. 839-20-050.

CONCLUSION

Amicus curiae Service Employees International Union respectfully urges that this Court grant certiorari in this case.

Respectfully submitted,

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ADDENDUM

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ALASKA

Alaska Stat. § 15.56.100(a) and (b)

(a) An employer commits the offense of refusal to allow employees time off if he refuses to allow an employee time off for the purpose of voting, or if he, after allowing the time off, deducts the time from the wages of the employee, except as provided in (b) of this section.

(b) An employee who has two consecutive hours in which to vote, either between the opening of the polls and the beginning of his regular working shift, or between the end of his regular working shift and the close of the polls, is considered to have sufficient time outside of his working hours within which to vote.

Alaska Stat. § 23.05.140(b) and (d)

(b) If the employment is terminated, regardless of the cause of termination, all wages, salaries, or other compensation for labor or services become due immediately and shall be paid within three working days after the termination at the place where the employee is usually paid or at a location agreed upon by the employer and employee.

(d) If an employer violates (b) of this section by failing to pay within three working days of termination, the employer may be required to pay the employee a penalty in the amount of the employee's regular wage, salary, or other compensation from the time of demand to the time of payment, or for 90 working days, whichever is the lesser amount.

Alaska Stat. § 23.010.037(a)

A person either personally or through an agent or representative may not request or suggest to an employee

of the person or an applicant for employment by the person or require as a condition of employment that the employee or applicant submit to an examination in which a polygraph or other lie-detecting device is used.

Alaska Stat. § 23.10.430

(a) An employer shall permit an employee or former employee to inspect and make copies of the employee's personnel file and other personnel information maintained by the employer concerning the employees under reasonable rules during regular business hours. The employer may require an employee or former employee who requests copies of material under this subsection to pay the reasonable cost of duplication.

(b) This section does not supersede the terms of a collective bargaining agreement.

ARIZONA

Ariz.Rev.Stat.Ann. § 23-351(A)

A. Each employer in this state shall designate two or more days in each month, not more than sixteen days apart, as fixed paydays for payment of wages to his employees.

Ariz.Rev.Stat.Ann. § 23-353(A)

A. When an employee is discharged from the service of an employer, he shall be paid wages due him within three working days or the end of the next regular pay period, whichever is sooner.

Ariz.Rev.Stat.Ann. § 23-1361(A)

"Blacklist" means any understanding or agreement whereby the names of any person or persons, list of names, descriptions or other means of identification shall be spoken, written, printed or implied for the purpose of

being communicated or transmitted between two or more employers of labor, their bosses, foremen, superintendents, managers, officers or other agents, whereby the laborer is prevented or prohibited from engaging in a useful occupation * * *

CALIFORNIA

Cal.Elec.Code § 14350

If a voter does not have sufficient time outside of working hours to vote at a statewide election, the voter may, without loss of pay, take off enough working time which when added to the voting time available outside of working hours will enable the voter to vote.

No more than two hours of the time taken off for voting shall be without loss of pay. The time off for voting shall be only at the beginning or end of the regular working shift, whichever allows the most free time for voting and the least time off from the regular working shift, unless otherwise mutually agreed.

If the employee on the third working day prior to the day of the election, knows or has reason to believe that time off will be necessary to be able to vote on election day, the employee shall give the employer at least two working days' notice that time off for voting is desired, in accordance with the provisions of this section.

Cal.Lab.Code § 227.3

Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served: provided, however, that an employment

contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

Cal.Lab.Code § 230(c)

(c) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other way discriminated against in the terms and conditions of such employment by his employer because such employee has taken time off to serve on an inquest of trial jury or to appear in court as a witness shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer. * * *

Cal.Lab.Code § 432.2(a)

No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment. * * *

Cal.Lab.Code § 1050

Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.

Cal.Lab.Code § 1198.5(a)

Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used to determine that employee's qualifications for employment,

promotion, additional compensation, or termination or other disciplinary action.

Cal.Code of Regs. tit. 8 § 11010(3)(A) and (F)

(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employees' regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight hours in any workday or more than six (6) hours in any workweek is permissible provided that the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek. * * *

(F) Except as provided in subsections (C) and (E), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employees of not less than one dollar ($1.00) per hour more than the minimum wage.

Cal.Code of Regs. tit. 8 § 11010(11)(A)

No employer shall employ any person for a work period of more than five (5) hours without a meal period

of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. * * *

Cal.Code of Regs. tit. 8 § 11010(12)

Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. * * *

HAWAII

Haw.Rev.Stat. § 11-95

Any voter shall on the day of the election be entitled to be absent from any service or employment in which such voter is then engaged or employed for a period of not more than two hours (excluding any lunch or rest periods) between the time opening and closing the polls to allow two consecutive hours in which to vote. * * *

Haw.Rev.Stat. § 378-26.5

It shall be unlawful for any employer to require a prospective employee or an employee to submit to a lie detector test as a condition of employment.

Haw.Rev.Stat. § 388-2

(a) Every employer shall pay all wages due to the employer's employees at least twice during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States or with checks convertible into cash on demand at full face value thereof; provided that when a majority of an employer's employees or a majority of the employees in a collective bargaining unit recognized by an employer or established by law elect, in a secret ballot election under procedures approved by the director of labor and industrial relations,

to be paid once a month on a regularly scheduled basis, the employees shall be paid on such monthly basis. The elections shall not be held more frequently than once in every two years and each election shall be valid for a period of two years.

(b) The earned wages of all employees shall be due and payable within seven days after the end of each pay period.

(c) The director may, upon application showing good and sufficient reasons, permit an employer to:

(1) Establish regular paydays less frequently than semimonthly provided that the employee shall be paid in full at least once each calendar month on a regularly established schedule;

(2) Pay earned wages within fifteen days after the end of each pay period.

Haw.Rev.Stat. § 388-6

No employer may deduct, retain, or otherwise require to be paid, any part or portion of any compensation earned by any employee except where required by federal or state statute or by court process or when such deductions or retentions are authorized in writing by the employee, provided that the following may not be so authorized, or required to be borne by the employee:

(1) Fines;

(2) Cash shortage in a common money till, cash box, or register used by two or more persons; or cash shortage in a money till, cash box, or register under sole control if the employee is not given an opportunity to account for all moneys received at the start of a shift and all moneys turned in at the end of a shift;

(3) Fines, penalties, or replacement costs for breakage;

(4) Losses due to acceptance by an employee of checks which are subsequently dishonored if employee is given discretion to accept or reject any check;

(5) Losses due to defective or faulty workmanship, lost or stolen property, damage to property, default of customer credit, or nonpayment for goods or services received by customer if such losses are not attributable to employee's wilful or intentional disregard of employer's interest; or

(6) Medical or physical examination or medical report expenses which accrue due to services rendered to an employee or prospective employee, where such examination or report is requested or required by the employer or prospective employer or required by any law or regulation of federal, state or local governments or agencies thereof.

An employer shall not deprive an employee of the employee's employment, or threaten or otherwise coerce the employee with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

Haw.Rev.Stat. § 621-10.5(a)

An employer shall not deprive an employee of the employee's employment, or threaten or otherwise coerce the employee with respect thereto, because the employee receives a summons, responds thereto, serves as a witness or attends court as a prospective witness.

IDAHO

Idaho Code § 2-218(1)

An employer shall not deprive an employee of his employment, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

Idaho Code § 44-903

No person, firm, corporation or other business entity or representative thereof, shall require as a condition for employment or continuation of employment any person or employee to take a polygraph test or any form of a so-called lie detector test.

Idaho Code § 45-606(1)

1. Upon layoff, or upon termination of employment by either the employer or employee, the employer shall pay or make available at the usual place of payment all wages then due the employee by the earlier of the next regularly scheduled payday or within ten (10) days of such layoff or termination, weekends and holidays excluded. However, if the employee makes written request upon the employer for earlier payment of wages, all wages then due the employee shall be paid within forty-eight (48) hours of the receipt of such request, weekends and holidays excluded.

Idaho Code § 45-608(1) and (2)

1. Every employer shall pay all wages due to his employees at least once during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States or with checks on banks where suitable arrangements are made for the cashing of such checks without charge to the employee. Nothing contained herein shall prohibit an employer from depositing wages due or to become due or in advance on wages to be earned in an account in a bank, savings and loan association or credit union of the employee's choice in the state, provided that the employee has voluntarily authorized such deposit. If the employee revokes such authorization for deposit, it shall be deemed terminated and the provisions herein relating to the payment of wages shall apply.

2. The end of the pay period for which payment is made on a regular payday shall be not more than ten (10) days before such regular payday; provided that if the regular payday falls on a nonworkday payment shall be made on a preceding workday.

MONTANA

Mont.Code.Ann. § 39-2-304(1)

A person, firm, corporation, or other business entity or representative thereof may not require as a condition of employment or continuation of employment, any person to take a polygraph test or any form of mechanical lie detector test.

Mont.Code.Ann § 39-2-801

It is the duty of any person after having discharged any employee from his service, upon demand by such discharged employee, to furnish him in writing with a full, succinct, and complete statement of the reason of his discharge and if such person refuses to do so within a reasonable time after such demand, it is unlawful thereafter for such person to furnish any statement of the reason of such discharge to any person or in any way blacklist or to prevent such discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this part.

Montg. Rev. Code § 39-2-904

A discharge is wrongful only if: (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; or (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (3) the employer violated the express provisions of its own written personnel policy.

Mont. Rev. Code § 39-2-912(2)

This part [the Montana Wrongful Discharge From Employment Act] does not apply to a discharge . . . of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

Montg. Rev. Code § 39-3-205(1) and (2)

(1) Except as provided in subsections (2) and (3), when an employee is separated from the employ of any employer, all the unpaid wages of the employee are due and payable within 3 days, except for employees of the state of Montana and its political subdivisions who would be paid on the next regular payday for the pay period during which the employee was separated from employment or 15 days from the date of separation from employment, whichever occurs first, either through the regular pay channels or by mail if requested by the employee. However, if an employer's payroll checks originate at an office outside the state, the time provided in this section for payment of wages must be extended for 3 additional days.

(2) Except as provided in subsection (3), if an employee is separated for cause from employment by the employer, all the unpaid wages of the employee are due and payable immediately upon the separation.

NEVADA

Nev.Rev.Stat. § 62.410(1)

It is unlawful for an employer or his agent to: (a) Terminate the employment of a person who, as the parent, guardian or custodian of a child, appears with or on behalf of the child.

Nev.Rev.Stat. § 608.019

(1) An employer shall not employ an employee for a continuous period of 8 hours without permitting the

employee to have a meal period of at least one-half hour. * * *

(2) Every employer shall authorize and permit all his employees to take rest periods, which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. * * * Authorized rest preiods shall be counted as hours worked, for which there shall be no deduction from wages.

(3) This section does not apply to:

(a) Situations where only one person is employed at a particular place of employment.

(b) Employees included within the provisions of a collective bargaining agreement.

Nev.Rev.Stat. § 608.020

Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of discharge shall become due and payable immediately.

Nev.Rev.Stat. § 608.100

It shall be unlawful for any employer of labor in this state to require his employee to rebate, refund, or return any part of the wage, salary or compensation theretofore paid to such employee.

Nev.Rev.Stat. § 613.210(2)

A person shall not black-list or cause to be black-listed or published the name of or cause to be published the name of any employee, mechanic or laborer discharged by that person with the intent to prevent that employee, mechanic or laborer from engaging in or securing similar or other employment form any other person.

OREGON

Or.Rev.Stat. § 652.140(2)-(5)

(2) When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.

(3) For the purpose of this section, if employment termination occurs on a Saturday, Sunday or holiday, payment of wages is made "immediately" if made no later than the end of the first business day after the employment termination, except that if the employment is related to activities authorized under ORS chapter 565, payment of wages is made "immediately" if made no later than the end of the second business day after the employment termination.

(4) The employer shall forward such wages by mail to any address designated by the employee if the employee requests the employer so to do. An employer may deposit such wages without discount in the employee's account in a bank, national bank, mutual savings bank, credit union, or savings and loan association in this state, provided the employee and the employer have agreed to such deposit.

(5) This section does not apply to employment for which a collective bargaining agreement otherwise provides for the payment of wages upon termination of employment.

Or.Admin.R. 839-20-050(1) and (3)

(1) Every employer shall provide to each employee . . . an appropriate rest period. * * *

(3) "Appropriate rest period" means a period of not less than 10 minutes without deduction from the employee's pay for every four hours or major part thereof worked in one rest period.

Or.Admin. 839-20-100(2)

[T]he provisions of OAR 839-20-050 do not apply to employees covered by a collective bargaining agreement.

WASHINGTON

Wash.Rev.Code § 13(2)

An employer shall not deprive an employee of employment or threaten, coerce, or harass an employee, or deny an employee promotional opportunities because the employee receives a summons, serves as a juror, or attends court for prospective jury service.

Wash.Rev.Code § 49.12.240

Every employer shall, at least annually, upon the request of the employee, permit that employee to inspect any or all of his or her own personnel file(s).

Supreme Court, U.S.
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No. 92-1920

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

KAREN LIVADAS

Petitioner,

VS.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF BY RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

KAREN LIVADAS,

Petitioner,

VS.

LLOYD W. AUBRY, JR., IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF BY RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

A. *The Solicitor General's Brief Poses And Answers A Different Question From That Addressed By The Ninth Circuit's Decision*

The Solicitor General, with all due respect, has, in the opinion of the Labor Commissioner, misstated the question when he presented the following for review:

> Whether petitioner may sue the California Labor Commissioner for injunctive relief and damages under 42 U.S.C. 1983, for refusing to prosecute her state wage-and-hour claim based on her status as an employee covered by a collective bargaining agreement containing an arbitration clause? (Br. of Amicus, i)

As the California Labor Commissioner has pointed out in his prior brief to this Court, the correct question posed by this case to reach the issue addressed by the Ninth Circuit is:

> May a state agency refuse to adjudicate claims filed by workers employed under the terms of collective bargaining agreements containing arbitration clauses when state law prohibits the agency from entertaining any claims involving any dispute regarding the interpretation or application of any collective bargaining agreement containing an arbitration clause? (Br. in Opp. i)

DISCUSSION

A. *There Can Be Little Doubt That The Question Posed By The Solicitor General Requires The Conclusion Reached In The Amicus Curiae Brief*

The question posed by the Solicitor General requires, of course, the conclusion reached in his brief. There's little doubt, based upon a fair reading of current caselaw, that if the refusal to prosecute Livadas' claim was simply based upon her status as an employee covered by a collective bargaining agreement containing an arbitration clause, the Labor Commissioner's actions would be preempted by the federal law. However, such was not the question addressed by the Ninth Circuit nor is that the policy of the Commissioner. As the majority opinion in the Ninth Circuit recognized, Livadas argued that the Commissioner deprived her of her right to bargain collectively because he denied her enforcement of

certain sections of the California Labor Code based on his determination that adjudicating her dispute would concern the interpretation or application of a collective bargaining agreement containing an arbitration clause. (Pet. App. 2a)

The majority of the panel in the Ninth Circuit went on to correctly state that: "The Commissioner's policy is not to adjudicate any dispute *concerning the interpretation or application* of any collective bargaining agreement containing an arbitration clause." (Pet. App. 8a) As the panel further found, Livadas did not object to this policy of the Commissioner "because she concedes that the Commissioner's enforcement policy under those circumstances would be preempted by federal labor law." (Pet. App. 8a)

Thus, summarizing the majority decision, the panel found the Commissioner refused to adjudicate Livadas' state-law claim based upon his finding that such adjudication would require the *interpretation* and/or *application* of the terms of the collective bargaining agreement. Livadas contended, as the Ninth Circuit stated, that the Labor Commissioner's legal conclusion that he had no jurisdiction was incorrect. (Pet. App. 11a) The Ninth Circuit then responded:

> Livadas is left, then, with the simple claim that the Commissioner erroneously interpreted his own policy. That amounts only to a state law claim that she is in fact eligible for the Commissioner's enforcement under California Labor Code §229. *The appropriate relief would be a writ of mandate for the California Courts*, see *Baker v. Aubry*, 216 Cal.App.3d 1259, 265 Cal.Rptr. 381 (1989), *review denied*, Mar. 15, 1990, *cert. denied*, 111 S.Ct. 66 (1990) and she could seek such relief on the ground that the Commissioner misinterpreted §229. A misinterpretation of a pefectly valid state statute, however, does not provide grounds for federal relief. (Pet. App. 12a, emphasis added)

B. *Review Of Whether The Facts In Livadas' Claim Required Interpretation Or Application Of A Collective Bargaining Agreement Which Requires Arbitration Does Not Warrant Certiorari*

As detailed in the Commissioner's Brief in Opposition to Certiorari (See Br. in Opp. 6-7), California law requires that the failure to pay wages at time of discharge be "willful" before the right to penalty wages arises under Labor Code §203. A "willful" failure to pay is not present when the employer is able to present any "good faith dispute" as to whether wages are due. (Title 8, California Code of Regulations, §13520)

The policy of the Labor Commissioner regarding the provisions of Labor Code §229[1], is, as the Ninth Circuit found, not only consistent with, but, in fact, "required under federal law." (Pet. App. 11a) The application of that policy by the Labor Commissioner on a case-by-case basis is subject to review by the California courts.

Both the dissenting judge in the Ninth Circuit and the Solicitor General rest their analysis on a conclusion which they consider obvious — "it is not necessary to refer to the collective bargaining agreement to determine whether Safeway paid petitioner immediately upon termination as required by state law." (Br. of Amicus, 13) The problem, which neither the dissent nor the Solicitor General address, is how, in a case such as that presented by Livadas, the Labor Commissioner (or any trier of fact) is to determine (1) how much, if any,

[1]California Labor Code §229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

wages were due the worker at time of termination; (2) whether the failure to pay the worker was willful as that term is used in the California law, and (3) the appropriate wage rate to be used in determining the penalty wage, without both interpreting and applying the terms of the collective bargaining agreement.

The task of making these determinations is complicated in this case, as in most cases involving a collective bargaining agreement, where the CBA provides for two general employee classifications, eleven separate subclassifications in each of the general classifications, bonus pay, shift differential, termination pay and overtime compensation provisions[2]. The simple statement to the effect that one need not look to the CBA to determine the validity of the claim is misleading when one considers all of the issues involved.

More importantly, this is not the sort of legal disagreement which is worthy of review by this Honorable Court.

C. *The California Labor Commissioner's Policy Does Not Provide A Blanket Preclusion Of Enforcement Of Wage-And-Hour Claims Of Individuals Subject To CBAs Containing Arbitration Clauses*

Contrary to the conclusion reached by the Solicitor General, the California Labor Commissioner has <u>not</u> adopted a general rule that he does not enforce wage-and-hour claims of individuals covered by collective bargaining agreements containing arbitration clauses. (See Br. of Amicus, 13) As outlined above, the state statute (Labor Code §229) simply precludes the Labor Commissioner (or the California courts) from exercising any jurisdiction over a claim which requires

[2]Among the exhibits submitted by Livadas below is a copy of the applicable CBA reflecting all of these facts.

the *application* or *interpretation* of the terms of a collective bargaining agreement which contains an arbitration clause.

The Labor Commissioner has always exercised jurisdiction over cases involving the payment of wages to workers covered by collective bargaining agreements containing arbitration clauses where the inquiry did not require the application or interpretation of the CBA.

In the legal opinion of the California Labor Commissioner, the adjudication[3] of the claim filed by Livadas for recovery of penalties under the provisions of California Labor Code §203[4] would require the interpretation and application of the terms and conditions of the collective bargaining agreement between her employer and her union. In the event that the legal conclusion reached by the California Labor Commissioner in this particular case was incorrect, it was an incorrect interpretation of the California law; not the result of "a general rule that exceeds the scope of federal preemption." (Br. of Amicus, 13)

Thus, in the event that the legal conclusion of the Labor Commissioner was (arguably) erroneous, the remedy available

---

[3]The Solicitor General, in framing his question, uses the word "prosecute" to describe the action of the California Labor Commissioner. It is possible that the Solicitor General misunderstands the role of the Labor Commissioner. As the Ninth Circuit pointed out, it is an adjudicatory process which is at issue here. The California Labor Commissioner has both prosecutorial and quasi-judicial powers. (See California Labor Code §98(a) and §98.3, for instance) The Labor Commissioner declined to exercise his adjudicatory power in this case.

[4]The provisions of the applicable Labor Code sections are set out in Respondent's Brief In Opposition To Petition For Writ of Certiorari. Contrary to the conclusion reached by the Solicitor General, simply determining the rate of pay as provided in the CBA is not sufficient to adjudicate Livadas' claim. The question of willfulness and the correct wage rate to be applied to determine the penalty must also be addressed.

to the petitioner is, as the Ninth Circuit indicated, correctly addressed to the California courts by writ of mandate.

CONCLUSION

The Ninth Circuit Court of Appeals, based on the facts in the record, correctly framed the question which was to be addressed in this case and, based on that question, correctly determined that petitioner failed to state a federal cause of action.

Reframing the question as the Amicus Curiae Brief of the Solicitor General does, simply disregards the facts in the case and the issues addressed by the Court of Appeals. The question, as reframed by the Solicitor General, demands but one answer — that which the Solicitor reaches; but that question does not address the underlying issue in the case: May a state agency refused to adjudicate a state law claim which requires the *interpretation* or *application* of a collective bargaining agreement if that CBA contains an arbitration clause?

Respectfully submitted,

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 3, 1993
CERTIORARI GRANTED JANUARY 21, 1994

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2/16/90	1	COMPLAINT
3/6/90	5	ANSWER by Defendant Lloyd W. Aubry, Jr.
3/30/90	6	MOTION by Defendant Lloyd W. Aubry, Jr. for joinder
3/30/90	8	DECLARATION of H. Thomas Cadell re motion for joinder
4/16/90	9	MOTION by Plaintiff Karen Livadas for summary judgment
4/16/90	13	AFFIDAVIT (and Exhibits A-B) of Karen Livadas regarding motion for summary judgment
4/30/90	17	MOTION by Defendant Lloyd W. Aubry, Jr. for summary judgment
4/30/90	18	MEMORANDUM by Defendant Lloyd W. Aubry, Jr. in support of motion for summary judgment
5/2/90	22	ORDER by Judge Thelton E. Henderson denying motion for joinder
5/15/90	27	ORDER by Judge Thelton E. Henderson denying motion for summary judgment
6/27/90	34	ORDER by Judge Thelton E. Henderson granting plaintiff's motion for reconsideration, counsel to refile summary judgment motions
10/12/90	47	JUDGMENT: entered in favor of plaintiff by Judge Thelton E. Henderson
11/6/90	53	NOTICE OF APPEAL by Defendant Lloyd W. Aubry, Jr. from Dist. Court decision
11/9/90	63	DECLARATION of James H. Curry in support of motion for stay pending appeal by Defendant
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11/27/90	Joint Motion for Expedited Appeal Filed
12/19/90	Order Granting Joint Motion for Expedited Appeal
1/11/91	Appellant's Opening Brief Filed
2/22/91	Appellant's Reply Brief Filed
9/11/91	Opinion and Order of the Court of Appeals for the Ninth Circuit
9/25/91	Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc Filed
4/29/92	Order Directing Response to Petition for Rehearing
3/8/93	Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc; Amended Opinion of the Court of Appeals for the Ninth Circuit.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KAREN LIVADAS,
PLAINTIFF,

v.

LLOYD AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
DEFENDANT

DECLARATION OF H. THOMAS CADELL IN SUPPORT OF MOTION TO JOIN ADDITIONAL PARTY DEFENDANTS
Filed March 30, 1990

I, H. Thomas Cadell, Jr., declare:

1. I am an attorney duly licensed to practice before the courts of the State of California and the U.S. District Court, Northern District of California and attorney for the defendant, LLOYD AUBRY, JR., Labor Commissioner, in the above-entitled action.

* * *

6. Attached hereto as Exhibit A is a copy of the collective bargaining agreement provided by Plaintiff's counsel to the undersigned entitled "Food Store Contract, March 1, 1989-February 29, 1992, United Food & Commercial Workers Union, Local 373, AFL-CIO, Solano and Napa Counties" (hereinafter, the "CBA") which is the applicable agreement governing the employment of Plaintiff LIVADAS by Safeway Stores, Inc.

* * *

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on March 29, 1990, at San Francisco, California.

/s/ H. Thomas Cadell, Jr.
H. THOMAS CADELL, JR.

EXCERPTS FROM EXHIBIT A TO CADELL DECLARATION

FOOD STORE CONTRACT MARCH 1, 1989—FEBRUARY 29, 1992

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 373, AFL-CIO

1.3.7 CONTRACT COVERAGE AND ENFORCEMENT:

* * *

In the event the Employer fails to observe the terms of this section in any respect, the Union shall notify the Employer in writing of such violation and it shall be corrected. Following such notice if the Employer again, within six (6) months, violates the terms hereof and it is so determined by the Adjustment Board or Arbitrator, then in such event, such Employer shall no longer be entitled to a non-food or general merchandise clerk classification, and the food clerk rates shall thereafter become applicable to all non-food or general merchandise work in the Employer's store where the violation occurred.

3.1 ***

PROBATION: There shall be a probationary period of sixty (60) calendar days for all employees. During the probationary period, a probationer may be discharged without right of appeal . . .

3.2 TERMINATION: Except for reasons beyond the Employer's control, regular employees who work on three (3) days per week or more shall be given three (3) working days notice of layoff, dismissal or discharge, or the equivalent pay, except when such termination has been for cause, such as insubordination, disorderly or improper conduct, under circumstances requiring immediate termination. Employees who work on two (2) days per week shall be given two (2) working days notice under like conditions. In all such cases the day on which such notice is given shall not be counted

unless a notice is given before the day's work begins. (A regular employee is one who has been in the continuous employ of the Employer for a period of ninety (90) days or longer).

3.3 WORK PERFORMANCE: The Employer shall have the right to discharge any employee for just cause. If the employee feels that he has been unjustly discharged, he shall have the right of appeal in writing to the Adjustment Board through action of the Union within ten (10) business days after the date of said discharge.

4.2 CLASSIFICATIONS: Seniority shall be by classification listed as follows in Section 1.3 and 9 hereof.

1. Managing Clerks
2. Senior Head Clerks and Senior Produce Clerks
3. Head Clerks
4. Journeyman and Apprentice Clerks
5. Floor Clerks, Non-Food and General Merchandise Clerks
6. Courtesy Clerks—subject to the restrictions of Section 9.1.5.4. hereof. Seniority of Courtesy Clerks shall be on a store-by-store basis, except that Courtesy Clerks transferred to another location will carry Courtesy Clerk seniority with them to the new location.

   In the event that an Apprentice Clerk who had previously served as a Courtesy Clerk is going to be laid off before the completion of the first 520 hours of the apprentice progression then in that event the Apprentice Clerk may step back temporarily into the Courtesy Clerk classification at the store in which they are currently working until recalled.
7. Employees employed in classifications covered by addendum agreements shall be deemed separate classifications.

   [The detailed contractual definitions of the eight classifications listed herein are contained at Section 9 *et. seq.* omitted from this Joint Appendix.]

4.10 PART-TIME EMPLOYEES:

4.10.1 Request for full-time work: Part-time Journeymen Clerks may bid for full-time forty (40) hour job openings or part-time job openings with more hours [with certain exclusions omitted]

4.10.2 Request for additional hours: Part-time employees may request additional available hours within their classification on a store-by-store basis provided they have the previously mentioned qualifications, are available for the hours, and have notified their store manager, in writing, of their desire for more hours and they shall be afforded such hours by seniority.

4.10.4 Reduction in hours and layoff: Reduction in part-time employees' hours, due to lack of work, shall be accomplished by seniority and by classification on a store-by-store basis. When layoffs occur due to lack of work, the last employee hired in the classification shall be the first to be laid off.

4.10.5 Wage Claims: It is understood that employees will not be able to claim wages under this interpretation, except for hours lost commencing with the weekly schedule immediately following the Union's written notification to the Employer of the claim and thereafter until resolved. If the employee or the Union gives written notice to the Employer within seven (7) days of his notice of layoff, the above provisions do not apply.

5.7 PAY DAY AND DEDUCTIONS: Employees shall be paid at least once each week within five (5) days after the termination of the week's work and before his shift terminates on pay day except in extenuating circumstances and any holiday week when the above period shall be increased to six (6) days. The Employer shall furnish each employee with a weekly wage statement showing his name, hours of work, overtime if any, total wages paid and list of deductions made.

5.15.2 FULL-TIME FUNERAL LEAVE: When a regular full-time employee on the active payroll is absent from work for the purpose of arranging for or attending the funeral of a

member of his immediate family as defined below, the Employer shall pay him for eight (8) hours at his regular rate of pay for each day of such absence up to a maximum of three (3) days, provided:

1. The employee notified the Employer of the purpose of his absence on the first day of such absence;
2. The day of absence is one of the three days commencing with the day of such death or the day immediately following the day of such death;
3. The absence occurs on the day during which the employee would have worked but for the absence;
4. The day of absence is not later than the day of such funeral except where substantial travel time is required;
5. The employee, when requested, furnishes proof satisfactory to the Employer of the death, his relationship to the deceased, the date of the funeral, and the Employee's actual attendance at such funeral.

For the purpose of subsection 5.15.1 and 5.15.2, a member of the immediate family means the Employee's spouse, child, mother, father, sister, brother, mother-in-law, father-in-law, grandparents and grandchildren.

6.1 BASIC WORK DAY AND WEEK: Forty (40) hours consisting of five (5) days of eight (8) hours each in a calendar week, Sunday through Saturday, shall constitute a week's work as provided in this entire section. Employees other than those scheduled to work six (6) days in a week shall receive two (2) days off, not necessarily consecutive, in each calendar week. A day's work shall consist of eight (8) hours within nine (9) consecutive hours with one (1) full uninterrupted hour off for a meal.

* * *

A work week consisting of four (4) ten (10) hour days may be implemented by mutual agreement of the parties.

Holiday Work Week: For all full-time employees, thirty-two (32) hours, consisting of four (4) eight (8) hour days, exclusive of the holiday shall constitute a week's work in any week in which a holiday falls. Even if scheduled to work thirty-two (32) hours during the week of a holiday, part-time employees holiday pay shall be prorated in accordance with Section 10.1.6.

Work shall not be performed without pay prior to the beginning of the scheduled working day. Work may be performed at the end of the working day in completing service to a customer which commenced prior to the end of the working day. It is understood that the checking of produce or shelf prices shall be considered as time worked.

6.2 OVERTIME AND PREMIUM WAGE RATES: The overtime and premium wage rates of pay shall be as follows:

TIME-AND-ONE-HALF THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours per day.
2. Work in excess of forty (40) hours per week.
3. Work on the sixth (6th) day worked in a calendar week.
4. Work on the fifth (5th) and sixth (6th) day worked in a week containing one of the holidays named in this agreement not including the holiday worked.
5. Work performed after the fifth (5th) consecutive day worked without reference to the calendar week by a normal five-day employee until consecutive days are broken by a day off except when the schedule of an employee who has had or who is to have two (2) consecutive days off is changed in accordance with this agreement.
6. Work performed after the sixth (6th) consecutive day worked without reference to the calendar week by a normal six-day employee until consecutive days are broken by a day off, except when the schedule is being changed in accordance with this agreement.

7. Work performed by a full-time employee called in to work on a scheduled day off and given shorter notice than required by the agreement, but if such an employee works six (6) days during that calendar week, work performed on the scheduled day off shall be paid for at the employee's straight-time rate for that day and that on the sixth (6th) day worked shall be paid for at the overtime rate.
8. Work performed within ten (10) hours from the time the last shift ended.
9. Work performed where a meal period is not afforded in conformity with Section 7.5.
10. Work performed on Sunday following date of ratification.

DOUBLE THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours on the sixth (6th) day worked in a calendar week.
2. Work performed on Sunday which is a day in excess of five (5) consecutive days by a scheduled five-day employee except when the schedule of said employee who has had or is to have two (2) consecutive days off is changed in accordance with this agreement.
3. Work performed on the seventh (7th) day in a calendar week.
4. Effective December 31, 1988, work performed on a holiday named in this Agreement (in addition to holiday pay) regardless of which day of the week the holiday falls.

DOUBLE TIME AND ONE-QUARTER THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours on a Sunday following date of ratification.

DOUBLE TIME AND ONE-HALF THE STRAIGHT-TIME HOURLY RATE:

1. Work performed by a full-time employee on Sunday when Sunday was a scheduled day off and the employee was given shorter notice than that required by the agreement but if such an employee works (6) days during that calendar week, work performed on that Sunday shall be paid at the rate of time-and-one-half (1-1/2) the straight-time hourly rate and that on the sixth (6th) day worked, shall be paid for at the applicable overtime rate following date of ratification.

2. Work performed on Sunday which is in excess of six (6) consecutive days by a six-day employee.

TRIPLE THE STRAIGHT-TIME HOURLY RATE:

1. Work in excess of eight (8) hours on a holiday named in this Agreement.

* * *

6.4 SCHEDULED WORK: Whenever an employee's schedule is not changed in accordance with the provisions of this agreement and he is worked outside such schedule, then the hours so worked shall be paid for in accordance with the overtime provisions of this Agreement.

7.2. SHIFT INTERVAL: Except in bona fide emergencies, the minimum time off between shifts shall be ten (10) hours and employees called to work sooner than ten (10) hours from the end of their last work period shall be paid time and one-half (1½) the employee's straight time rate for all work performed up to the time said ten (10) hour period between shifts shall have elapsed.

7.5 MEAL PERIOD: Each employee shall be released from work for his meal period within five (5) hours, but no sooner than three (3) hours of the time of his reporting to work. Any employee who is given a meal period prior to three (3) hours into his shift or works in excess of five (5) hours without a meal period shall receive time and one-half (1½) for hours worked between the meal period and the completion of the third (3rd) hour or time and one-half (1½) for hours worked in excess of five (5) hours until a meal period is given.

In accordance with State law, a six (6) hour shift may be worked without a lunch period by mutual agreement of the parties.

7.7 DAILY GUARANTEE: Any full time employee (one who is normally scheduled to work forty (40) hours or more per week) who is ordered to report for work shall be guaranteed not less than eight (8) hours' work. Any part-time employees except students and courtesy clerks who are ordered to report for work shall be guaranteed not less than four (4) hours' work. Bona fide students, who, by reason of attending scheduled classes, may not work four (4) hours, may be individually excepted from this provision by written agreement of the Employer, the Union and the employee involved.

7.8 NIGHT PREMIUM: All employees shall receive extra compensation in addition to the regular scale herein set forth of fifty cents (50¢) per hour for all work performed between the hours of 7 p.m. and 7 a.m. Courtesy clerks shall receive fifty cents (50¢) per hour for work performed after 9 p.m.

9.8 TRANSFER OR REMOVAL OF WORK:

* * *

9.8.1.1 Any employee losing hours of employment by reason of such transfer or removal of work shall either be compensated at his regular rate of pay for such hours, or he shall be given other comparable employment by the Employer in the area covered by this Agreement at compensation equal to that received by him prior to the work transfer. If the comparable employment is within the bargaining unit then he shall retain his seniority and other benefits under the contract.

10.1 The following days shall be recognized as paid holidays: Employee's Birthday, New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving Day and Christmas Day.

It is understood that the day of observance for Washington's Birthday, Memorial Day and Veteran's Day shall be those dates established by federal statute.

10.1.2. WORK: In the event that employees shall be obligated to work on any of the open holidays, they shall be paid at the rate of double their straight-time rate of pay in addition to the normal holiday pay.

* * *

10.1.3 PROBATIONARY EMPLOYEES: Probationary employees are not entitled to any paid holidays.

11.1 All employees who work four (4) hours or more per week who have been in the service of the Employer for one (1) year, twelve (12) consecutive months, shall be granted a minimum of two (2) weeks' vacation annually with pay. Such employees who have been in the service of the Employer for five (5) years or more shall receive three (3) weeks' vacation annually with pay. Such employees who have been in the service of the Employer for fifteen (15) years or more shall receive four (4) weeks' vacation annually with pay. Such employees who have been in the service of the Employer for twenty (20) years or more shall receive five (5) weeks' vacation annually with pay.

11.2 ACCUMULATION: Vacations may not be waived, nor may extra pay be received by any employee for work performed for the Employer during the employee's vacation period. Vacations may not be cumulative from year to year.

11.3 CONTINUITY: All loss from employment because of reasonable absence from work through sickness or other emergencies, or temporary layoff, not exceeding thirty (30) calendar days, shall be considered as time worked for the purpose of determining the length of employment.

11.4 PAY AND SPECIAL PROVISIONS: For the purpose of computing or prorating vacation earnings, four percent (4%) of the employee's earnings for the previous year equal two (2) weeks' vacation pay; six percent (6%) of the employee's earnings for the previous year equal three (3) weeks' vacation pay; eight percent (8%) of the employee's earnings for the previous year equal four (4) weeks' vacation pay; and ten percent (10%)

of the employee's earnings for the previous year equal five (5) weeks' vacation pay.

* * *

11.5 FUND: The parties by the execution of this collective bargaining agreement, agree to accept and be fully bound by the terms of the Northern California Retail Clerks Unions-Employers Vacation Fund and Plan, and any amendments thereto.

18.1 For the purpose of this Agreement, a grievance is a dispute, difference of opinion between the parties, and grievances of employees involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement, including the arbitrability of all such matters. All grievances as defined are to be processed in accordance with the terms of this section.

18.2 DISCIPLINARY GRIEVANCES: Pursuant to Section 3 of this Agreement, any employee who feels he has been unjustly discharged or suspended shall file a grievance with the Union and thereafter within ten (10) business days of notice of the disciplinary action, the Union, if it desires to proceed with the grievance, shall notify the Employer or its Representative that an Adjustment Board shall be convened to hear the grievance. Within twenty (20) business days (Monday-Friday, holidays excluded) thereafter, the Union and the Employer shall meet as a Board of Adjustment, consisting of two (2) representatives of the Employer and two (2) representatives of the Union in an effort to settle the matter. The convening of the Adjustment Board may be waived or this time limit may be extended by mutual agreement of the parties. If the matter is not adjusted and is impassed, the Union, if it so elects, within twenty (20) business days following the meeting of the Board of Adjustment shall proceed to arbitration. If the Employer fails to meet with the Union within the time limits herein specified, the grievance will be deemed substantiated and the employee shall be made whole. If the Union fails to

comply with the time limits herein specified, such failure shall be deemed to be a conclusive waiver of the grievance.

* * *

The following panel of arbitrators will be assigned by lot to each Union in the Retail Clerks Bay Area Joint Council for a six-month (6) period: Barbara Chvany, David C. Nevins, Professor Paul D. Staudohar, Donald Wollett and Dr. Joseph W. Garbarino.

* * *

18.3 INTERPRETATION OR APPLICATION DISPUTES: Disputes as to the interpretation or application of the agreement shall be taken up by the party asserting it with the other party within twenty (20) business days of the date the asserting party has knowledge thereof. Said grievance shall be in writing, specifying in detail the basis for the dispute, including the applicable section(s) of the Agreement involved, to the best knowledge of the asserting party.

The parties shall have fifteen (15) business days in which to process and amicably adjust the dispute. By mutual agreement of the parties, the time periods provided herein may be extended. [Procedure for arbitration utilizing panel of arbitrators set out in Section 18.2 omitted.]

* * *

18.5 The award of the arbitrator or the Adjustment Board shall be final and binding on the Employer, the Union and the Employee(s). All jointly incurred arbitration expenses shall be borne by the losing party. In the event of a dispute concerning the application of this Section, the arbitrator shall be empowered to determine the allocation of expenses.

18.6 The arbitrator shall not have the right to alter, amend, delete, or add to any of the terms of this Agreement.

18.7 Interest at seven percent (7%) shall be payable on all money claims awarded by the Adjustment Board or by an Arbitrator, and such interest shall commence as of the date the complaint is first submitted to the Adjustment Board or when the parties meet to amicably adjust the dispute, whichever is applicable.

18.8 CLAIMS: In the case of a direct wage claim or a claim for contributions to employee benefit plans which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement to either the grievance procedure provided for herein or to any other tribunal or agency which is authorized and empowered to effect such a settlement.

The Employer is not required to pay any wage claim or portion thereof retroactively for a period of more than six (6) months immediately prior to the date of the Employer's receipt, or written notice from the Union, of such claim.

A.3 BONUS ELIGIBILITY:

Each employee on the payroll on April 30, 1989, excluding Apprentice Food Clerks*, but including Journeymen Food Clerks hired subsequent to April 30, 1989, shall be eligible for a bonus determined on the following basis: [detailed contractual formula for measuring bonuses omitted.]

AFFIDAVIT OF KAREN LIVADAS
Filed April 16, 1990
[Caption Omitted in Printing]

I, KAREN LIVADAS, swear and affirm:

1. I am a member of Local 373, United Food and Commercial Workers, AFL-CIO.

2. I was terminated from my job with Safeway Stores in Solano County, California, on January 2, 1990.

3. On January 2, 1990, I went to my manager at Safeway Stores and requested all pay due me at the date of my termination, including vacation pay and hours worked during the previous week. My manager told me that he did not have any payroll records at the store and that he could not provide me with any pay at the time. My manager informed me that Safeway would mail a check to my house.

4. Safeway Stores did not pay me due and payable wages until January 5, 1990.

5. Neither Local 373, nor Safeway Stores, nor I dispute the amount of my final wage payment. My final wage payment of $2,112.49 included the correct amount of vacation pay due to me, as well as the correct number of hours I worked paid at the correct wage rate. This amount is calculated as follows:

128.5 days vacation pay at $13.78/hour
24 hours in previous week at $13.78/hour
Plus $.50/hour shift differential.

Neither Local 373, nor Safeway, nor I have initiated a grievance under the applicable collective bargaining agreement concerning the amount of my final wage payment, because all parties are in agreement that the amount of this payment was correctly calculated under the collective bargaining agreement covering my job. My dispute is that this wage payment was made three days after it was due under California law.

6. The collective bargaining agreement between Local 373 and Safeway Stores does not make any provision concerning

the timeliness of wage payments to employees who are discharged. This collective bargaining agreement is attached as Exhibit A to this affidavit [omitted].

7. I attempted to file a claim for wages and penalties due from Safeway on January 3 and 8, 1990, at the Napa office of the California Division of Labor Standards Enforcement (DLSE). On both occasions, DLSE officers inquired as to whether I was in a union, and told me that the DLSE cannot handle my claim as long as I am a union member.

8. On January 9, 1990, I was finally permitted to file a claim form with the DLSE. This claim was dismissed on February 7, 1990, through a letter to me from J. Aceves, Deputy Labor Commissioner. This letter is attached to this affidavit as Exhibit B.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10th day of April, 1990, at Vallejo, California.

/s/ Karen Livadas
KAREN LIVADAS

EXHIBIT B
TO AFFIDAVIT OF KAREN LIVADAS

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
3273 CLAREMONT WAY, ROOM 206
NAPA, CA 94558
Phone (707) 257-0660

February 7, 1990

Karen Livadas
40 Parkhaven Court
Vallejo, CA 94591

Re: Livadas vs Safeway Stores, Inc.
Case No. 16-2072

Dear Ms. Livadas:

This letter is in response to the wage matter you recently filed against Safeway Stores claiming a penalty pursuant to Labor Code Section 203 in that you did not receive payment of your final wages on the day of discharge.

It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.

Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

Therefore, we are unable to proceed on your claim for penalties and are closing our file. We are sorry we could not be of further assistance to you.

Very truly yours,

/s/ J. Aceves
J. ACEVES
Deputy Labor Commissioner

STATE OF CALIFORNIA — DEPARTMENT OF INDU... RELATIONS
DIVISION OF LABOR STANDARDS ENFC...EMENT
STATE LABOR COMMISSIONER

INITIAL REPORT OR CLAIM

PLEASE PRINT ALL INFORMATION

FOR OFFICE USE ONLY			
TAKEN BY	PROCEEDING NUMBER		ACTION
DATE TAKEN	PROGRAM: DO / BOFE	SOURCE: 1 / 2 / 3	IND. CODE
FIELD INVESTIGATION REFERRAL			
REFERRING OFFICE		DATE	

BEST AVAILABLE COPY

YOUR NAME	SOCIAL SECURITY NO.	NO. TAX EXEMPTIONS
Karen B. Livados	573 96 0266	0
YOUR ADDRESS — NUMBER AND STREET, APARTMENT OR SPACE NO., CITY, ZIP CODE	HOME PHONE NO.	WORK PHONE NO.
40 Parkhaven Ct. Vallejo Ca. 94591	(707) 643 7022	(707) 554 8035
KIND OF WORK DONE (OCCUPATION)	DATE OF HIRE	CALIFORNIA DRIVER'S LICENSE NO.	DATE OF BIRTH
grocery clerk	4-19-73	E0502073	4-25-54
WORK DONE AT — NUMBER AND STREET, CITY, COUNTY, ZIP CODE	PUBLIC WORKS PROJECT?	WAS YOUR JOB UNION?
Safeway #989 774 Adm. Call. Ln. Vallejo 94590	☐ YES ☒ NO	☒ YES ☐ NO

AGAINST

NAME OF BUSINESS	EMPLOYER'S NAME	☐ BANKRUPTCY ☐ BUSINESS SOLD ☐ INSOLVENCY
Safeway Stores Inc. #989	Safway Inc.	
ADDRESS OF BUSINESS		TELEPHONE NUMBER
774 Admiral Callagahan Ln. Vallejo Ca. 94590		(707) 554 8035
NAME OF PERSON IN CHARGE	TYPE OF BUSINESS	ESTIMATED NO. OF EMPLOYEES:	MINORS EMPLOYED?
Shane Ryan	grocery	120	☒ YES ☐ NO

WAGES — CONDITIONS OF EMPLOYMENT

RATE OF PAY — PER HOUR, DAY, WEEK OR MONTH (SPECIFY)	PAID BY PIECE RATE?	DID YOU WORK SPLIT SHIFTS?
$ 13.78 hr.	☐ YES ☒ NO	☐ YES ☒ NO
TOTAL HOURS WORKED: PER DAY: 8 PER WEEK: 40	PAID OVERTIME? ☐ YES ☐ NO	4 DAY / 10 HOUR WORKWEEK? ☐ YES ☒ NO	IF YES, WRITTEN AGREEMENT? ☐ YES ☐ NO
ARE YOU STILL WORKING FOR THIS EMPLOYER? ☐ YES ☒ NO	☐ QUIT ☒ DISCHARGED ON WHAT DATE?	IF QUIT, DID YOU GIVE 72 HOURS NOTICE? ☐ YES ☐ NO	WERE YOU PAID AT TIME OF DISCHARGE? ☐ YES ☒ NO
HAVE YOU ASKED FOR YOUR WAGES? ☐ YES ☐ NO — IF YES, ON WHAT DATE? 1-2-90	CHARGED FOR SHORTAGES? ☐ YES ☒ NO	RECORD OF HOURS WORKED KEPT? ☒ YES ☐ NO
HOW WERE YOU PAID? ☒ BY CHECK ☐ IN CASH	GIVEN A DEDUCTION STATEMENT? ☒ YES ☐ NO	UNIFORM / TOOLS REQUIRED? ☒ YES ☐ NO	IF YES, FURNISHED BY EMPLOYER? ☒ YES ☐ NO
MEAL PERIOD: ☐ ON DUTY ☒ OFF DUTY	MEALS FURNISHED? ☐ YES ☒ NO — IF YES, WRITTEN AGREEMENT? ☐ YES ☐ NO	MEALS FURNISHED: ☐ BREAKFAST ☐ LUNCH ☐ DINNER
LODGING FURNISHED: ☐ INDIVIDUAL ROOM ☐ SHARED ROOM ☐ APARTMENT	RENTAL VALUE OF APT. TO PUBLIC $	CASH ADVANCES (IF ANY) $ 0

GROSS WAGES CLAIMED (Do Not Deduct Payroll Taxes)

FROM (DATE) 19	TO (DATE) 19	NUMBER OF HOURS, DAYS, WEEKS OR MONTHS CLAIMED (SPECIFY)
		24 hrs @ 13.78 125 vacation hrs @ 13.78
AT THE RATE OF — PER HOUR, DAY, WEEK OR MONTH (SPECIFY) $	SUB-TOTAL →	$ 2112.49
	MINUS TOTAL OF CASH OR CREDITS RECEIVED →	$ 2112.49
	AMOUNT DUE OR BALANCE CLAIMED →	$ penalties only.

BRIEF EXPLANATION OF ISSUES (Use Additional Sheet If Necessary)

I was terminated from employment on 1/2/90 At that time I requested all monies due me to date. Shane Ryan, Mgr, told me "I can't cut you any money, they will probably mail a check to your house, that's how Safeway does it." I subsequently did receive the check via mail to my home on 1/5/90. I am claiming penalties from 1/2/90 - 1/5/90.

I HEREBY CERTIFY, That this is a true statement to the best of my knowledge and belief. Unless action on this claim is taken in accordance with Section 98 of the Labor Code, I assign all wages and all penalties accruing because of their nonpayment, and all liens securing them, to the Labor Commissioner of the State of California to collect in accordance with law.

MY NAME MAY BE USED IN ANY INVESTIGATION. ☒ YES ☐ NO

(Signed) Karen B. Livados Date 1-9-90

Address. 40 Parkhaven Ct. Vallejo Ca. 94591

DEFENDANT'S POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S COUNTER MOTION FOR SUMMARY JUDGMENT
Filed April 30, 1990
[Caption Omitted in Printing]

* * *

[at pp. 3-6]

II. ARGUMENT

A. Plaintiff Has Failed To Establish That The State's Policy Interferes With Her Federal Rights Under The Labor Relations Act

* * *

1. Plaintiff Misstates DLSE Policy And The Operative Facts Of This Case And Thereby Confuses Her Analysis Of The Applicable Law

a. DLSE Policy Does Not Depend On One's Status As A Member Of A Union

Plaintiff expressly maintains that her "participation in a labor union, and her participation in collective bargaining through representation of that union" (Complaint, p. 6, ls. 15-19) was the "sole reason" for her denial of the investigatory, prosecutorial, and remedial resources of DLSE provided under the California Labor Code (Complaint, p. 2, ls. 3-7). Unfortunately, Plaintiff has improperly stated DLSE policy under California law.

Simply stated, DLSE policy is based on its lack of authority under California law to determine "claims involving any dispute concerning the *interpretation or application* of any collective bargaining agreement containing [such] an arbitration agreement." (California Labor Code Section 229) The California courts have affirmed the construction of Labor Code Section 229 as stating a policy prohibiting the Labor Commissioner from hearing and enforcing wage claims where there exists a collective bargaining agreement which contains an arbitration clause. *Plumbing, Heating and Piping Employers Council of Northern California* v. *Howard* (1975) 53

Cal.App.3d 828. Although the claimant in *Howard* was a member of a union, the court did not mention union status as an operative fact necessary for application of the provision when it stated:

> "[I]t is concluded that the Legislature in enacting section 229 sought to encourage the resolution of labor disputes covered by collective bargaining agreements via arbitration-grievance procedures contained therein, and therefore intended to prohibit the Labor Commissioner from assuming jurisdiction to enforce claims arising under the collective bargaining agreements. *Id.* at 834-835.

Consequently, DLSE's policy does not depend on one's status as a member of a union as alleged in the Verified Complaint and repeatedly argued in the motion for summary judgment. The policy is founded on the generally accepted premise under both federal and state law that arbitration is in the best interests of all parties. *Perry* v. *Thomas*, 482 U.S. 483, 489; 107 S.Ct. 2520, 2525 (1986).

* * *

The letter sent to Plaintiff by DLSE dated February 7, 1990 (attached to Livadas Affidavit as Exhibit B) specifically states the basis for the Commissioner's action regarding her claim and reveals that DLSE's action was taken pursuant to the above-stated policy and was made without regard to union membership.

The policy of the DLSE relies upon the presence or absence of an arbitration clause in a collective bargaining agreement. A collective bargaining agreement which does not contain an arbitration clause would offer no impediment to the exercise of the Labor Commissioner's jurisdiction. On the other hand a collective bargaining agreement which covers non-union workers in an open shop would preclude the Labor Commissioner from exercising jurisdiction *if* that collective bargaining agreement contains an arbitration clause.

Therefore, the DLSE policy properly stated and supported by the facts in the instant action, establish that DLSE's policy is not discriminatory on the basis alleged.

b. Plaintiff Has Not Established That She Has A Right Under California Law To A Determination By The Labor Commissioner

Plaintiff essentially maintains that the denial of benefits and protections by DLSE which, Plaintiff alleges, were available under the California Labor Code [Section 203 penalties for late payment of wages upon discharge from employment] constitutes an interference with federally protected rights. (Pl. Mem. of P&A in Supp. of S.J., p.6) However, Plaintiff has not established how she can be entitled to an adjudication of her claim for penalty wages by the Commissioner in the first instance *in view of* the applicable provisions in California Labor §229 and the *Howard* case which constitute *state* laws that specifically deprive the Commissioner of jurisdiction to hear and enforce claims where there exists a collective bargaining agreement containing an arbitration clause.

Thus, if, as the *Howard* case holds, state law prevents the Commissioner from assuming jurisdiction in cases where there exists a collective bargaining agreement containing an arbitration clause, how could DLSE's policy based on that law deprive Plaintiff of benefits and protections under California law, let alone further interfere with federally protected activities under the NLRA?

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KAREN LIVADAS,
Plaintiff,
v.
LLOYD W. AUBRY, JR., in his official capacity as Labor Commissioner for the State of California,
Defendant.

NO. C 90 0468 TEH

ORDER

This matter comes before the Court on plaintiff's motion for summary judgement and defendant's cross motion for summary judgement. After carefully reviewing the parties' arguments, the Court has decided to CANCEL oral argument and DENY plaintiff's motion and DENY defendant's motion for the reasons set forth below.

FACTUAL BACKGROUND

Plaintiff seeks declaratory and injunctive relief for the California Division of Labor Standards Enforcement's alleged policy of discriminating against union members in administering the state wage and hour law. Defendant affirmatively alleges, among other defenses, that the terms of plaintiff's employment at Safeway are governed by a collective bargaining agreement which contains a mandatory and binding arbitration clause, and that the Division properly investigated and dismissed plaintiff's claim on the grounds that the Commissioner was precluded from interpreting or applying the terms of the collective bargaining agreement to determine damages allegedly due to plaintiff.

DISCUSSION

1. *Standard for Summary Judgement*

Summary judgement is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung* v. *FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); Fed. R. Civ. P. 56(c). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1976). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* at 2511 (citations omitted). In ruling on a summary judgement motion, a court must view all facts and draw all inferences in the light most favorable to the nonmoving party. *Poller* v. *CBS, Inc.*, 368 U.S. 464 (1962).

2. *Disputed Material Facts*

The parties are in dispute as to numerous material facts, namely, whether; (1) plaintiff requested all pay due her by her employer at the date of her termination from her Manager; (2) Safeway did not pay plaintiff due and payable wages until January 5, 1990; (3) any of the parties dispute the amount of plaintiff's final wage payment; (4) any of the parties initiated a grievance under the applicable collective bargaining agreement concerning the amount of plaintiff's final payment; (5) the collective bargaining agreement has a provision concerning the timeliness of wage payments to employees who are discharged; and (6) plaintiff attempted to file a claim on January 3 and January 8, 1990 at the Napa Office of the Division of Labor Standards Enforcement, and on both occasions was told that the DLSE could not handle her claim as long as she was a member of a union.

In light of the numerous material issues of fact in dispute, summary judgment for either party would be inappropriate at this time.

Accordingly, the Court HEREBY DENIES plaintiff's motion for summary judgement and also HEREBY DENIES defendant's cross motion for summary judgement.

IT IS SO ORDERED.

Dated: May 15, 1990

/s/ Thelton E. Henderson
JUDGE THELTON E. HENDERSON
United States District

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KAREN LIVADAS,
Plaintiff,
v.
LLOYD W. AUBRY, JR., in his official capacity as Labor Commissioner for the State of California,
Defendant.

NO. C 90 0468 TEH

ORDER

This matter comes before the Court on plaintiff's motion for reconsideration of the Court's May 15, 1990 Order denying plaintiff's motion for summary judgement and defendant's cross motion for summary judgement. After carefully reviewing the parties' arguments, the Court has decided to GRANT plaintiff's motion.

FACTUAL BACKGROUND

Plaintiff seeks declaratory and injunctive relief for the California Division of Labor Standards Enforcement's alleged policy of discriminating against union members in administering the state wage and hour law. Defendant affirmatively alleges, among other defenses, that the terms of plaintiff's employment at Safeway are governed by a collective bargaining agreement which contains a mandatory and binding arbitration clause, and that the Division properly investigated and dismissed plaintiff's claim on the grounds that the Commissioner was precluded from interpreting or applying the terms of the collective bargaining agreement to determine damages allegedly due to plaintiff.

On May 15, 1990, the Court issued an order denying the parties' cross motions for summary judgement on the basis

that there were six material factual issues in dispute. The Court listed the following facts as being in dispute whether: (1) plaintiff requested all pay due her by her employer at the date of her termination from her Manager; (2) Safeway did not pay plaintiff due and payable wages until January 5, 1990; (3) any of the parties dispute the amount of plaintiff's final wage payment; (4) any of the parties initiated a grievance under the applicable collective bargaining agreement concerning the amount of plaintiff's final payment; (5) the collective bargaining agreement has a provision concerning the timeliness of wage payments to employees who are discharged; and (6) plaintiff attempted to file a claim on January 3 and January 8, 1990 at the Napa Office of the Division of Labor Standards Enforcement ("DLSE"), and on both occasions was told that the DLSE could not handle her claim as long as she was a member of a union.

The Court's ruling was based largely on the pleadings and two documents submitted by plaintiff and defendant respectively in support of their motions: plaintiff's "Statement of Material Facts Not in Dispute," and defendant's "Response to Plaintiff's Statement of Material Facts Not in Dispute." The court gained crucial information as to the nature of the underlying facts in this action from the papers the parties filed in regard to the instant motion. This additional information has lead the Court to change its previous ruling on this matter as set forth below.

DISCUSSION

1. *Legal Standard for Summary Judgement*

Summary judgement is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung* v. *FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1976). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the

nonmoving party. Id. To oppose a motion for summary judgement on the grounds that there is a genuine issue of material fact in dispute a party ". . . may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e)

2. *Analysis*

a. *Facts 1–4*

In its motion for reconsideration, plaintiff contends that defendant's grounds for disputing Facts 1 - 4, general denials for lack of knowledge in his Answer, are not adequate to create a genuine issue for trial under Fed. R. Civ. P. 56(e). In response, defendant argues that its general denial surpasses the Rule 56(e) test. Defendant further asserts that plaintiff relies on "hearsay" to establish Facts 1 and 2 and this evidence is insufficient to establish the facts alleged.

Contrary to defendant's assertions, a close examination of defendant's Answer reveals that defendant's grounds for disputing Facts 1–4 do not surpass the Rule 56(e) threshold.

Furthermore, defendant's contention that the affidavits made and submitted by plaintiff are insufficient to establish the Facts 1 and 2, for the purposes of a summary judgement motion, is without merit. Plaintiff's affidavit reveals what facts plaintiff would testify to at trial. In regard to Facts 1 and 2, plaintiff would testify that on the date of her termination she requested all pay due her from her manager, and that she was not paid such wages on that date. Plaintiff has personal knowledge of these facts, and at this juncture, these facts do not appear to entail the establishment of any out-of-court statement admitted for the truth of the matter asserted. As with defendant's Rule 56(e) contention, defendant's hearsay argument is without merit.

b. *Fact 5*

The fifth fact listed by the Court was whether "the collective bargaining agreement has a provision concerning the

timeliness of wage payments to employees who are discharged." Plaintiff contends that, "the question relevant to Plaintiff's motion for summary judgement is whether Plaintiff's collective bargaining agreement contains the same provisions of California Labor Code Sections 201 and 203 that wage payments be made immediately to discharged employees, and that wage penalties be paid for late payment." Plaintiff further contends that this question is a question of law rather than fact, since the collective bargaining agreement is in front of the Court and its meaning is not ambiguous. *United States* v. *King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988); *International Union of Bricklayers, Local 20* v. *Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir. 1985).

Plaintiff's argument here as well as defendant's response has crystallized for the Court that Fact 5 does indeed present a question of law rather than fact. Defendant tries to counter plaintiff's contention by claiming that a union and employer may agree on a manner in which a contractual benefit may be paid and that the Collective Bargaining Agreement contains language, which although not exactly the same as Sections 201 and 203, reveals such an agreement between plaintiff's union and employer. In support of its contention defendant cites *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985). The dispute between the parties as to Fact 5 thus may be reduced as follows: plaintiff contends that her right to a timely wage payment and wage penalties derives from state labor law, not the CBA, whereas defendant contends that plaintiff's right to such wages and penalties, if indeed such a right exists, can only derive from the Collective Bargaining Agreement. Given that the Collective Bargaining Agreement is before the Court, the dispute over Fact 5 is a question of law, rather than fact and thus does not impede resolution of a motion for summary judgement.

c. *Fact 6*

In regard to the sixth fact, plaintiff contends that although the parties are in dispute over what Department of Labor

officials told plaintiff on January 3, 1990 and January 8, 1990, this dispute is immaterial to the resolution of the case. Plaintiff argues that plaintiff has established defendant's liability by submitting a letter from Deputy Labor Commissioner Aceves, which informs plaintiff that the Department refuses to proceed on her claim for penalties under the California Labor Code because she is covered by a collective bargaining agreement with an arbitration clause. (exhibit B, Livadas Affidavit). Consequently, plaintiff contends the veracity of Fact 6, whether the Department announced its policy reasons for refusing to process plaintiff's claim in the Napa office on January 3, or 8, is immaterial to the resolution of this case, since Deputy Commissioner Aceves' February 7, 1990 letter announced the questioned policy.

Defendant fails to effectively respond to plaintiff's materiality argument. Defendant does not address the materiality of Fact 6 to the resolution of the cross motions for summary judgement but instead states that since plaintiff has failed to identify the individuals to whom she allegedly spoke on her alleged visits to the Napa Office, Fact 6 remains in dispute. Plaintiff's argument in its motion for reconsideration, has convinced the Court that while Fact 6 is in dispute, its resolution is immaterial to the resolution of this suit.

CONCLUSION

Regarding the factual issues listed by the Court in its May 14, 1990 Order as being in dispute, the Court HEREBY finds as follows: Facts 1–4 are not genuinely in dispute; Fact 5 presents a question of law rather than fact; and Fact 6 is in dispute but immaterial to the resolution of this case. Accordingly, and good cause appearing, the Court HEREBY GRANTS plaintiff's motion for reconsideration. If the parties wish to have the Court consider their respective motions for summary judgement, they must re-file the motions pursuant to Local Rule 220.

IT IS SO ORDERED.

Dated: June 27, 1990

/s/ Thelton E. Henderson
JUDGE THELTON E. HENDERSON
United States District

DECLARATION OF JAMES H. CURRY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL
Filed November 9, 1990
[Caption omitted in printing]

I, JAMES H. CURRY, declare:

1. Lloyd Aubry, Jr., the named defendant in the above-entitled action was the Labor Commissioner for the State of California and Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, until his resignation in December, 1989, to return to the private practice of law.

2. I am the current Acting Labor Commissioner for the State of California and have been employed with the Division of Labor Standards Enforcement as Chief Deputy Labor Commissioner from April 1987 to August 1990 when I was appointed Acting Labor Commissioner.

3. Among my primary duties as Acting Labor Commissioner is to oversee implementation of policies and all enforcement activities of the Division of Labor Standards Enforcement.

4. I have reviewed the Order (Memorandum Opinion) filed on October 12, 1990 in the above action.

5. It is clear from the language in the Order that the Labor Commissioner is now required to enforce sections 201 and 203 of the California Labor Code *without* regard to any given claimant's coverage under a collective bargaining agreement having an arbitration clause.

6. The above-mentioned Order will have an enormous effect on the enforcement policies and practices of DLSE which since 1975 has been enjoined from hearing and enforcing claims for penalty wages under Labor Code Section 203 pursuant to the California Court of Appeal decision in *Plumbing, Heating and Piping Employers Council of Northern California* v. *Howard* 53 Cal.App.3d 826 (1976).

7. Initially, the Labor Commissioner is now in the untenable position of either being in violation of the California state

court injunction prohibiting the very action which the U.S. District Court enjoins, or be in violation of the U.S. District Court order which orders the Commissioner to hear the very claim the state court injunction precludes. In short, the Commissioner will be in violation of at least one order by doing nothing or by acting to comply with either order.

8. As a result of the Order rendered in this action, a problem now exists due to the fact that all Deputy Labor Commissioners who receive and/or adjudicate wage claims in 32 offices throughout California will now have to process claims previously not heard by the Labor Commissioner. The claims the Order requires to be accepted involve a working knowledge of federal labor and contract laws.

9. Since all collective bargaining agreements contain a wage provision and nearly all contain additional relevant provisions pertaining to worker classifications, vacation pay, termination, and discharge "for cause", a Deputy reviewing a claim under Labor Code Section 203 must to some extent review, interpret, and analyze these type of collective bargaining provisions to determine whether all wages have been paid as well as address such issues as the basis for termination which may render other CBA provisions and procedures relevant.

10. Additionally, since there is no single collective bargaining agreement governing all California union workers, each agreement will have to be reviewed on an individual basis in order to determine Section 203 penalty wages.

11. The Deputy Labor Commissioners in the field offices have no extensive experience or expertise in federal law, statutory or case law, which is necessary to construe and/or interpret provisions in collective bargaining agreements which are governed exclusively by federal law. Only two of the 38 Hearing Officers are attorneys.

12. Consequently, it will be necessary to determine the scope of additional educational training for all Deputies *statewide* in order to implement and comply with this Court's order at substantial expense in time and resources, all of which

will be necessary to insure effective, fair, and uniform implementation of any required modifications to DLSE's enforcement activities. Moreover, such action and public expense will be lost and not recoverable if the judgment and order is reversed on appeal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 8, 1990, at San Francisco, California.

/s/ James H. Curry
JAMES H. CURRY
Acting Labor Commissioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN LIVADAS,
Plaintiff-Appellee,

vs.

LLOYD W. AUBRY, JR., in his official capacity as Labor Commissioner for the State of California
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of California
Hon. Thelton E. Henderson, Judge

APPELLANT'S OPENING BRIEF
Filed January 11, 1991

* * *

[at pp. 3-4]

III. STATEMENT OF ISSUES

1. Whether the District Court erred in ruling that Plaintiff-Appellee, as an individual, has a private right of action under 42 U.S.C. §1983 to vindicate her rights under the National Labor Relations Act (hereinafter "NLRA").

2. Whether the District Court erred in ruling that the State's policy which precludes enforcement action by the Labor Commissioner of claims under California Labor Code Sections 201 and 203 where there exists a collective bargaining

agreement containing an arbitration clause infringes upon Plaintiff-Appellee's NLRA-based right to work under a collective bargaining agreement containing an arbitration clause.

3. Whether the District Court erred in ruling that §301 of the LMRA did not preempt Plaintiff's state claim filed with the Labor Commissioner for recovery of penalty wages under California Labor Code Sections 201 and 203.

4. Whether Plaintiff-Appellee's claim of alleged late payment of wages upon discharge would have been subject to defenses raised by the employer which would have required an interpretation or application of the terms of the CBA.

5. Whether the District Court erred in ruling that the State's policy as mandated by a state court injunction is preempted by §§7 and 8 of the NLRA.

6. Whether the District Court erred in granting Plaintiff-Appellee summary judgment against Defendant-Appellant and denying Appellant's crossmotion for summary judgment.

7. Whether the District Court erred in granting Plaintiff-Appellee the injunctive relief granted.

8. Whether the District Court erred in awarding (conditional) damages under 42 U.S.C. §1983 against Defendant-Appellant.

APPELLANT'S REPLY BRIEF
Filed February 22, 1991
[Caption Omitted in Printing]

[at p. 1]

I. ARGUMENT

A. PLAINTIFF APPEARS TO MISUNDERSTAND THE POSITION OF THE COMMISSIONER IN REGARD TO ENFORCEMENT OF RIGHTS ARISING UNDER SECTION 7 OF THE N.L.R.A.

1. Commissioner's Enforcement Policy Is Not Based Upon Union Membership But Upon The Provisions Of The Collective Bargaining Agreement

Plaintiff continues to contend that the basis for the dismissal by the Labor Commissioner of Karen Livadas' claim for recovery of "waiting time penalties" for lack of jurisdiction was her membership in a union and her "loyalty to that chosen representative." As Commissioner has pointed out, however, the enforcement policy looks simply at whether there is a collective bargaining agreement and whether that contract contains an agreement to arbitrate. It is not necessary that a worker be a member of a union in order to be covered under the terms of a collective bargaining agreement. Further, it is not necessary that a collective bargaining agreement contain an arbitration clause.

Thus, the enforcement policy which Livadas attacks does not rely upon a determination of whether one does or does not belong to a union. The Labor Commissioner's enforcement policy, based as it is on state statutory and case law, simply reflects the long-standing federal and state policy to encourage arbitration.

* * *

Supreme Court, U.S.
FILED
MAR 2 1994
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No. 92-1920

In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER,

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE
STATE OF CALIFORNIA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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March 1994

QUESTION PRESENTED

May a state agency refuse to enforce state wage-and-hour law for union workers because they exercise their federally-protected right to bargain collectively, under *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986)?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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No. 92-1920

In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER,

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the District Court is reported at 749 F.Supp. 1526, and appears at pages 22a to 50a of the Appendix to the petition for a writ of certiorari (Pet. App. 22a-50a). The decision of the Court of Appeals is reported at 943 F.2d 1140. On March 8, 1993, the Court of Appeals filed an order adding a footnote to its earlier opinion and denying Livadas's petition for rehearing. Pet. App. 51a-53a. The Court of Appeals' final amended opinion is reported at 987 F.2d 552 and is reprinted at Pet. App. 1a-21a.

JURISDICTION

The Court of Appeals filed its amended opinion, along with an order denying Livadas's timely petition for rehearing, on March 8, 1993. The petition for a writ of certiorari was filed on June 3, 1993. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following statutes will be set out in relevant part in the appendix to this brief: Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. §157; Sections 203(d) and 301(a) of the Labor-Management Relations Act (LMRA), 29 U.S.C. §§173(d) and 185(a); 42 U.S.C. §1983; Cal.Code Civ.Pro. §§1084, 1085 (West 1989); Cal.Lab.Code §§90.5(a), 98(a), 98.3(a), 201, 203 and 229 (West 1989).

STATEMENT OF THE CASE

A. Facts

The California Labor Commissioner, head of the Division of Labor Standards Enforcement (DLSE), is charged with enforcing the state Labor Code on behalf of employees who "are financially unable to employ counsel and . . . have claims which are valid and enforceable." Cal.Lab.Code §98.3(a). The California Labor Code imposes a number of wage-and-hour regulations on employers in the state; for example, the Labor Code requires employers to give employees their final paycheck immediately on termination, with daily penalties for any delay. Cal.Lab.Code §§201 and 203. The policy of the DLSE is to enforce these regulations for all employees except those covered by a collective bargaining agreement with grievance arbitration. Pet. App. 25a, J.A. 20.

Petitioner Karen Livadas is a grocery clerk. She is a member of Local 373, United Food and Commercial Workers, AFL-CIO. At all material times, her employment with Safeway Stores was governed by a collective bargaining

agreement through Local 373. Her union contract contained a provision for arbitration of any grievances alleging violations of the agreement. J.A. 11. Virtually all union contracts provide for grievance arbitration, as the Court noted in *Lingle* v. *Norge Div. of Magic Chef*, 486 U.S. 399, 411 n.11 (1988).

Livadas worked at Safeway Stores in Napa County, California until she was fired on January 2, 1990. *See* Pet. App. 2a. On that day, she demanded all pay due her. Her store manager told Livadas that Safeway would mail her a check instead. She received her final paycheck on January 5, 1990. *Id.*

On January 9, 1990, Livadas applied to the local office of the DLSE to enforce Cal.Lab.Code §§201 and 203 against Safeway for its three-day delay in her final wage payment. Livadas was given a one-page DLSE form entitled "Initial Report or Claim." J.A. 18. This standardized intake form asks applicants, among other questions, "Was your job union?" Livadas checked the box "Yes." *Id.* Livadas specified that she did not dispute the amount of her final paycheck, but only claimed late penalties for the three-day delay in payment. *Id.*

The Division's only response to Livadas's complaint was a form letter dated February 7, 1990. J.A. 16-17. The Division's February 7, 1990 letter reads in full:

> This letter is in response to the wage matter you recently filed against Safeway Stores claiming a penalty pursuant to Labor Code Section 203 in that you did not receive payment of your final wages on the day of discharge.
>
> It is our understanding that the employees working for Safeway Stores are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.
>
> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective

bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

Therefore, we are unable to proceed on your claim for penalties and are closing our file. We are sorry we could not be of further assistance to you.

J.A. 16-17. Aside from its stated "understanding" that Safeway employees had a standard union contract, the Division's letter did not refer to any particular term of Livadas's union contract.[1] The letter reflects the Division's policy prohibiting enforcement of any claim for late penalties where there exists a union contract with an arbitration clause, on the ground that such a claim would always require the application of a collectively bargained wage rate. *See* Pet. App. 25a, J.A. 20.

No hearing was ever held on Livadas's Labor Code charge. Safeway Stores was never required to appear or plead defenses to Livadas's complaint.

B. Proceedings Below

Livadas brought this action against the Labor Commissioner under 42 U.S.C. §1983, seeking declaratory and injunctive relief against the DLSE's policy of excluding workers with union contracts from the enforcement of the state Labor Code. Livadas contends that the Commissioner's policy impermissibly penalizes union workers in California for exercising their federal right to organize and bargain collectively, a right protected from state interference by §7 of the National Labor Relations Act (NLRA), 29 U.S.C. §157, under *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989) (*Golden State I* and *II*).

[1] Nothing in the record indicates that the Division even had a copy of Livadas's union contract when it refused to take further action on her complaint. Livadas's union contract was apparently not in the agency's file when this litigation commenced; counsel for the Division had to refer to a copy of this agreement obtained from Livadas's counsel after this action was filed. *See* J.A. 1, para. 6.

The Commissioner argues that his agency excludes workers covered by standard union contracts[2] under the compulsion of a 1975 state court injunction, *Plumbing, Heating and Piping Employers Council* v. *Howard*, 53 Cal.App.3d 828, 126 Cal.Rptr. 406 (Cal.Ct.App. 1975). The Commissioner justifies this policy disqualifying union workers by citing Cal.Lab.Code §229, which prohibits the Commissioner from intervening in "any dispute concerning the interpretation or application of any collective bargaining agreement containing . . . an arbitration agreement." On this basis, Livadas and the Commissioner submitted the case on cross-motions for summary judgment.

The District Court (Henderson, J.) granted Livadas's motion for summary judgment. The District Court held that Cal.Lab.Code §§201 and 203 are minimum standards of employment that do not require interpretation of a worker's union contract and are therefore not preempted by §301 of the LMRA, following *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 747-58 (1985), *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21-22 (1987) and *Lingle* v. *Norge Div. of Magic Chef*, 486 U.S. 399, 403-11 (1988). Pet. App. 40a-48a. The District Court held that the Commissioner's policy of refusing to enforce these wage-and-hour regulations for union workers imposes an impermissible penalty on their NLRA-protected activity. Pet. App. 27a-39a. Following *Golden State I*, the District Court issued a state-wide injunction ordering the Commissioner "to enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause." Pet. App. 49a.

[2] Federal law recognizes an arbitration clause as a standard element found in virtually all collective bargaining agreements. *See Lingle*, 486 U.S. at 411 n. 11. Under federal law, grievance arbitration is "part and parcel of the collective bargaining process itself." *Steelworkers* v. *Warrior & Gulf Navigation*, 363 U.S. 574, 578 (1960).

After an expedited appeal, a divided Ninth Circuit panel reversed. The panel majority (Rymer, J.; Alarcon, J. concurring) declined to decide whether Cal.Lab.Code §§201 and 203 are actually preempted by federal labor law. Instead, the Court of Appeals emphasized that the Commissioner's exclusion policy is based on Cal.Lab.Code §229, a "perfectly valid" state labor preemption statute. The panel majority reasoned that even if the Commissioner's application of this state statute is wrong, his resulting "erroneous eligibility determination" is, at most, an error of state law for which federal law provides no remedy. Pet. App. 12a. The Ninth Circuit acknowledged that, "by virtue of the fact that Livadas is covered by a collective bargaining agreement, she may be more likely to get an erroneous eligibility determination" than non-union workers, but the Court of Appeals reasoned that this result is simply "a function of the complexity of preemption law and the inherent tension between federal and state systems for adjudicating labor disputes." Pet. App. 12a-13a. The panel majority concluded: "[W]e believe that Congress would not want state officials erring on the side of adjudicating labor disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a [union contract]." Pet. App. 14a.

In dissent, Judge Kozinski protested that anti-union discrimination violates federal rights, whatever the Commissioner's motives. Despite the Commissioner's belief that he is complying with state labor preemption law, the fact remains that "the only employees excluded as a class are those who exercise their federal labor rights." Pet. App. 20a. According to Judge Kozinski, "[w]e can't duck the question whether such federal law renders such discrimination impermissible." Pet. App. 17a.

Judge Kozinski accused the majority of obscuring this discrimination by "seek[ing] refuge in a novel doctrine of quasi-preemption," under which state officials should refuse enforcement to union workers "by virtue of certain penumbras and emanations radiating from the body of federal labor law." Pet. App. 17a. Judge Kozinski insisted that it is inappropriate for courts "to guess at what Congress 'presumably' would have wanted," and he warned that the majority's divination of "some preemptive corona surrounding the federal labor laws" would nullify this Court's efforts to clarify what is *not* preempted.[3] Pet. App. 18a.

This Court granted certiorari on January 21, 1994.

SUMMARY OF ARGUMENT

At its heart, this is a simple case. Petitioner Karen Livadas has exercised the core rights secured to employees under the National Labor Relations Act to engage in collective bargaining and have a collective bargaining agreement providing for arbitration. Respondent, the Labor Commissioner for the State of California, has a policy that anyone who has exercised these rights is denied his services in enforcing Cal.Lab.Code §§201 and 203, which require employers to pay employees their accrued wages upon termination or be liable for a penalty. The Labor Commissioner's enforcement services are otherwise generally available to California employees. *See* Cal.Lab.Code §98.3(a).

This is a clear deprivation of federal rights secured by the NLRA, redressible under §1983. The Commissioner has required, as a condition for his services in enforcing state-law

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[3] Two academic commentators have already criticized the Court of Appeals' decision and applauded Judge Kozinski's dissent. *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 618-20 (1992); Note, *The Golden State of Labor Preemption: The Circuit Courts Have Gone Too Far*, 44 Hastings L.J. 131, 156-58 (1992).

minimum labor standards, that employees in California refrain from exercising their rights under the NLRA. Under *Golden State II*, the Commissioner's policy is not only preempted because it penalizes conduct which is protected by the NLRA, but it is also subject to remedy under §1983.

The Commissioner's defense and the decision of the Court of Appeals are based on notions of §301 preemption that are foreclosed by this Court's decisions. The Court of Appeals held that state officials like the Commissioner should not enforce state minimum labor standards laws when it is even arguable that enforcement may involve a union contract providing for grievance arbitration. Pet. App. 14a. This Court's decisions in *Metropolitan Life* and *Fort Halifax*, decisions that the Court of Appeals majority did not acknowledge, hold the opposite. The Commissioner and the Court of Appeals believed that Livadas's claim under §§201 and 203 was preempted by §301 of the LMRA, because the late penalty Livadas was entitled to under state law was measured by her rate of pay established by the collective bargaining agreement. This Court has made it clear that a state- law claim is not preempted by §301 of the LMRA simply because the state court must obtain a datum such as rate of pay from a collective bargaining agreement. *See Lingle*, 486 U.S. at 413 n. 12.

The Court of Appeals also supported its conclusion that Livadas had no §1983 claim by inventing a new principle not previously found in the jurisprudence of either labor law preemption or §1983. The Court of Appeals held that there is no deprivation of federally-secured rights remediable under §1983 if the state acts pursuant to a statute which is facially valid. Pet. App. 12a. The law is exactly the opposite. What matters is whether the conduct is protected by federal law, not whether the state law considered apart from its application is valid. *See Monroe* v. *Pape*, 365 U.S. 167, 172-176 (1961) (overruled in part not relevant here, *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 664-689 (1978)); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971).

Finally, the Court of Appeals was of the view that instead of exercising §1983 jurisdiction to protect Livadas's federal rights from deprivation, the District Court should have relegated Livadas to state court to seek the extraordinary writ of mandamus against the Commissioner. The Court has instructed the federal courts not to abstain in these circumstances. *See New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 364-73 (1989). There is no reason why the federal courts should stay out of a case where a state agency is systematically penalizing the exercise of federal rights because of false notions of NLRA preemption, and where there have been no formal proceedings under state law.

This Court should reverse the Court of Appeals' decision, and reinstate the District Court's injunction prohibiting the Commissioner from refusing to enforce Cal.Lab.Code §§201 and 203 on the basis of a claimant's coverage under a collective bargaining agreement with an arbitration clause.

ARGUMENT

I. THE COMMISSIONER ADMITTEDLY HAS A POLICY OF NOT ENFORCING THE CALIFORNIA LABOR CODE ON BEHALF OF EMPLOYEES COVERED BY COLLECTIVE BARGAINING AGREEMENTS CONTAINING ARBITRATION CLAUSES

A. The Commissioner's Judicial Admissions

The Labor Commissioner has lately made a decisive concession:

> There's little doubt, based upon a fair reading of current caselaw, that if the refusal to prosecute Livadas's claim was simply based upon her status as an employee covered by a collective bargaining agreement containing an arbitration clause, the Labor Commissioner's actions would be preempted by the federal law.
>
> (Supp. Brief by Respondent In Reply To Brief For the United States as Amicus Curiae, at 2).

Significantly, the Commissioner now concedes that it is a violation of federal law for a state to deny its services to a person simply because the person is covered by a collective bargaining agreement with an arbitration clause. All that is left of the Commissioner's position is that his agency does not have such a policy, *cf. id.* at 5-6; otherwise, the deprivation of federal rights is admitted.

The record contradicts the Commissioner's current disavowal of his agency's policy. As the District Court summarized the Commissioner's position, "[b]oth of the parties agree that the policy of the DLSE is to enforce Labor Code §§201 and 203 for all employees except for those whose work is governed by CBA's containing binding arbitration clauses." Pet. App. 25a. The Commissioner repeatedly and explicitly articulated this exclusion policy below:

> The California courts have affirmed the construction of Labor Code Section 229 as stating a policy prohibiting the Labor Commissioner from hearing and enforcing wage claims where there exists a collective bargaining agreement which contains an arbitration clause. . . .

Defendant's Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, J.A. 19. *See generally* J.A. 19-21.

After the District Court's judgment, the Commissioner moved to stay the injunction on the ground that the order "will have an enormous effect on the enforcement policies and practices of DLSE which since 1975 has been enjoined from hearing and enforcing claims for penalty wages under Labor Code Section 203. . . ." Decl. of James H. Curry, para. 6, J.A. 31. In the Court of Appeals, the Commissioner defined the following "Statement of Issues" in his appeal:

> 2. Whether the District Court erred in ruling that this State's policy which precludes enforcement action by the Labor Commissioner of claims under California Labor Code Sections 201 and 203 where there exists a collective bargaining agreement containing an arbitration clause infringes upon Plaintiff-Appellee's NLRA-based right to work under a collective bargaining agreement containing an arbitration clause.

Appellant's Opening Brief, J.A. 34-35. In his reply brief in the Court of Appeals, the Commissioner repeated:

> As Commissioner has pointed out, however, the enforcement policy looks simply at whether there is a collective bargaining agreement and whether that contract contains an agreement to arbitrate.

J.A. 36. Similar admissions were made in other pleadings below.[4]

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[4] Memorandum of Points and Authorities in Support of Motion to Join Additional Party Defendants, Docket No. 7, pp. 11-12; Defendant's Points and Authorities in Support of Motion Stay Pending Appeal, Docket No. 55, pp. 3, 5, 7-8.

B. The Commissioner Refused Livadas's Claim Pursuant To This Policy

The Commissioner's enforcement policy was also explained in his agency's February 7, 1990 letter refusing to take further action on Livadas's complaint. J.A. 16-17. According to the agency's no-action letter, the rate of pay necessary to calculate the amount of any statutory late penalty would have to be derived from Livadas's collective bargaining agreement, a reference that the agency regards as a prohibited application of the terms of such an agreement. J.A. 16. The Commissioner's rationale applies uniformly to any claimant covered by a collective bargaining agreement with grievance arbitration, no matter what particular substantive provisions that agreement contains. The Commissioner admitted below that the February 7, 1990 no-action letter was the direct result of the Commissioner's statewide exclusion policy:

> The letter sent to Plaintiff by DLSE dated February 7, 1990 . . . specifically states the basis for the Commissioner's action regarding her claim and reveals that DLSE's action was taken pursuant to the above-stated policy. . . .
>
> The policy of the DLSE relies on the presence or absence of an arbitration clause in a collective bargaining agreement.

J.A. 20. In refusing further action on Livadas's charge, the DLSE did not refer to any particular provision of her union contract. The simple fact that she was covered by a collective bargaining agreement with grievance arbitration was a sufficient reason to exclude her, according to the agency's stated rule of enforcement.

II. THE COMMISSIONER'S POLICY IS PREEMPTED BY FEDERAL LABOR LAW

A. The Commissioner's Policy Is In Direct, Actual Conflict With The NLRA

There can be little question that the Commissioner's treatment of Livadas's claim was preempted by federal law. There

is a direct, actual conflict between Livadas's rights under the NLRA and the Commissioner's refusal to take her claim because she exercised those rights.

> If employee conduct is protected under §7, then state law which interferes with the exercise of these federally-protected rights creates an actual conflict and is preempted by direct operation of the Supremacy Clause.
>
> * * *
>
> [i]f the state law regulates conduct that is actually protected by federal law, . . . preemption follows . . . as a matter of substantive right.

Brown v. *Hotel Employees*, 468 U.S. 491, 501, 503 (1984). *See also Bus Employees* v. *Missouri*, 374 U.S. 74, 81-82 (1963); *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 391 (1951); *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 458-459 (1950). This Court has held specifically that a state may not refuse minimal state-law employment rights, such as unemployment insurance benefits, to employees because they exercise rights under the NLRA. *See Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967) ("Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan.")

B. If The Commissioner's Policy Were Not Directly Preempted, It Would Be Preempted Under The *Machinists* Doctrine

Even if the Commissioner's policy were not directly preempted because of their conflict with Livadas's explicit Section 7 rights, it would still be preempted as a state-law interference with the collective bargaining process under *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). "[T]he Act and the National Labor Relations Board were intended to facilitate bargaining between the parties." *Golden State Transit Corp.* v. *Los Angeles*, 475

U.S. 608, 617 (1986). "'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.'" *Id.*, at 619, quoting *New York Tel. Co.* v. *New York Labor Depart.*, 440 U.S. 519, at 551 (1979) (Powell, J., dissenting). As Judge Kozinski recognized, the Commissioner's discrimination against union members because they have chosen to exercise their NLRA rights inevitably burdens the collective bargaining process.

> It is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: "Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you." In a closely fought election, this type of argument might make a difference.

Pet. App. 21a n.2.[5] That is not all. The effect of the Commissioner's policy is certainly felt by already-unionized employees, like Livadas herself. They have an ongoing choice whether to continue with collective bargaining. *See* NLRA §9(c)(1)(A)(ii), 29 U.S.C. §159(c)(1)(A)(ii). The Commissioner's abandonment will influence the decision whether to retain collective bargaining and grievance arbitration as much as it will the initial decision to select a collective bargaining representative. Since the purpose of the NLRA is to facilitate collective bargaining, and the Commissioner's policy inevitably discourages it, *Machinists* preemption applies here, too.

[5] This scenario is realistic. Employers combatting union organizing drives may lawfully warn employees that the employer will bargain from scratch, and that all existing benefits may be discontinued as a result of collective bargaining. *See Clark Equipment Co.*, 278 NLRB 498, 499 (1986).

III. LIVADAS IS ENTITLED TO A REMEDY UNDER §1983 BECAUSE THE COMMISSIONER'S POLICY DEPRIVED HER OF HER RIGHTS TO COLLECTIVE BARGAINING UNDER NLRA

A. Elements Of A §1983 Cause Of Action

The fact that preemption exists, however, does not necessarily mean that there is a §1983 claim.

> Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to §1983 exists every time a federal rule of law pre-empts state regulatory authority.

Golden State II, 493 U.S. at 107-108. Put another way, an attempt to enforce a preempted state law does not necessarily mean that the person against whom enforcement is sought is thereby deprived of a federally protected right.[6]

To establish the availability of §1983 to remedy a governmental violation of federal statutory rights, a plaintiff must assert the violation of a statutory right, an inquiry subdivided into questions (a) whether the asserted statutory right creates an obligation binding on the governmental unit, as opposed to being no more than a congressional preference for certain kinds of treatment, (b) whether the asserted right is so vague and amorphous that it is beyond the competence of

[6] For instance, in *Wisconsin Dept. of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), the State sought to punish an employer for the commission of unfair labor practices under federal law. The state law was held to be preempted, and the employer was protected from the law's operation. But the employer would have no remedy under §1983 because it had no federally protected *right* to commit unfair labor practices or even to be free from additional punishment for them. The purpose of preemption in *Gould* was not to benefit the wrongdoer but to preserve uniformity in the enforcement of federal labor law. *See id.* at 286-89.

the judiciary to enforce, and (c) whether the right was intended to benefit the petitioner. *See Golden State II*, 493 U.S. at 106.[7]

Golden State II has answered the first question. The rights conferred by the NLRA on employees are secured to them against interference by the States, as well as by employers and labor organizations. *Id.*, 493 U.S. at 111-12. The remaining questions in this case, therefore, are whether the rights Livadas asserts are ascertainable and whether she is their intended beneficiary. The answer to both questions is clearly yes. Indeed, none of the opinions below, including that of the Court of Appeals majority, expressed any doubt that §1983 is available to Livadas. *See* Pet. App. 7a, 21a, 32a.

B. The Commissioner's Policy Deprives California Workers Such As Livadas Of Rights Under The NLRA Which Are Ascertainable And Of Which They Are The Intended Beneficiaries

1. Three Rights: To Select A Collective Representative; To Bargain Through That Representative; And To Bargain For Arbitration

The Labor Commissioner's policy requires California workers to give up three separate rights as a condition to enjoying the Commissioner's services in enforcing Cal.Lab.Code §§201 and 203. Each of these rights is expressed in the words of the Act, and is central to its concerns. The first is the right to decide whether to have a collective bargaining representative. The second is the right to have a collective bargaining agreement negotiated by that representative. The third is the right to negotiate arbitration as the means of resolving disputes under the agreement.[8] These are "nestled" rights: employees cannot have arbitration of their grievances under the collective bargaining agreement unless they have negotiated such an agreement, which requires in turn that they have exercised their right to select a representative. Refusing state services because there is arbitration in a collective bargaining agreement necessarily deprives them of their right to select a representative and negotiate an agreement through that representative; the exercise of both these rights is the *sine qua non* of arbitration.

[7] A defendant may overcome this showing by demonstrating that Congress specifically foreclosed a remedy under §1983, *see Golden State II*, 493 U.S. at 106-107, but the Court held that this is not possible with respect to the NLRA because its comprehensive remedial scheme only addresses the actions of employers and labor organizations, not those of state and local governments. *See id.* at 111-12.

a. Selection Of A Representative And Bargaining

The Commissioner has argued that employees are not the intended beneficiaries of these rights under the NLRA, but that only employers and unions are. There is nothing to this argument, and it was rejected by both of the courts below. *See* Pet. App. 4a-7a, (Court of Appeals majority), 21a (Kozinski, J., dissenting), 27a-32a (District Court). The NLRA, and particularly the core statutory rights affected here, were primarily intended for the benefit of employees and less so for unions and employers.

Starting with Section 1 ("Findings and Policies") the focus of the NLRA is on securing to employees the right to organize and bargain collectively.

> The denial by some employers of the *right of employees to organize* and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest. . . .

[8] This is a clearer case for the application of federal preemption than *Golden State* itself. Here, the rights deprived are expressly guaranteed by the words of the statute. By contrast, Golden State Transit's implied immunity from regulation under the *Machinists* preemption doctrine was so unclear that the District Court and the Court of Appeals did not believe it existed. *See Golden State I*, 475 U.S. at 612. Moreover, in *Golden State II*, even though the immunity had been found to exist, the difficult question was presented whether the NLRA secured it to the employer.

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce. . . .
>
> Experience has proved that protection by law of the *right of employees to organize and bargain collectively* safeguards commerce from injury. . . .
>
> 29 U.S.C. §151, emphasis added.

Section 7, entitled "Rights of Employees," provides:

> *Employees* shall have the *right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

29 U.S.C. §157, emphasis added. Section 9 provides for the selection by employees of collective bargaining representatives, and in subsection 9(b), the National Labor Relations Board is instructed "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." 29 U.S.C. §159. The NLRA plainly refers to employees as the primary beneficiaries of the statutory provisions.

b. The Particularly Important And Favored Right To Negotiate Arbitration

One of the most common exercises of employees' Section 7 rights to engage in collective bargaining is the negotiation of an agreement to arbitrate contractual disputes. Unquestionably, arbitration is the product of collective bargaining and nothing else; unless there is a collective bargaining agreement in effect providing for it, there is no obligation to arbitrate. *Litton Financial Printing* v. *NLRB*, 501 U.S. 190, 111 S.Ct.

2215, 2227 (1991). Although it is consensual, it is greatly encouraged by federal labor policy[9]. *See* Labor Management Relations Act, §203(d), 29 U.S.C. §173(d). This Court has said:

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement. [footnote and citations omitted]. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. [footnote omitted].

Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

The Commissioner argues that his policy of refusing enforcement of Cal.Lab.Code §§201 and 203 somehow facilitates the federal policy favoring arbitration. This argument misses the point. Under federal law, labor arbitrators may only enforce rights arising under the union contract, not rights created by external law. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974).

Livadas would be unable to claim her statutory late penalties through a contract grievance, because her union contract does not provide for immediate wage payment on termination or for penalties for late payment. *See* Pet. App. 42a. In the event that an arbitrator did try to award a remedy for Livadas's statutory claim under Cal.Lab.Code §§201 and 203, the award would be swiftly vacated in federal court as outside the arbitrator's authority. *See Steelworkers* v. *Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960). By disqualifying union workers from Labor Code enforcement, the Commissioner is not protecting the arbitration of contractual grievances; he is penalizing workers for negotiating union contracts in the first place.

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[9] So forceful is the policy in favor of arbitration that a no-strike obligation will be inferred, even when it is not expressly stated, from the existence of the agreement to arbitrate. *See Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 386-88 (1974); *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

This policy is a disincentive for employees to support their representatives' agreement to arbitration. They give up not only what they intended to exchange, the right to strike, *see Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), but also their rights to minimum labor standards provided under state law. This Court has been careful to remove disincentives to agreements to arbitrate.[10] It should remove this disincentive for the same reason.

2. These Rights Are Secured To Employees By The NLRA, Not Just To Unions and Employers

This Court's previous decisions show that NLRA rights, including the right to negotiate, belong to employees as well as employers and unions. Employees have the right, even though they have not selected an exclusive representative, to collectively demand changes in their terms and conditions of employment. *NLRB* v. *Washington Aluminum*, 370 U.S. 9, 14 (1962). *Washington Aluminum* establishes that employees do not need a labor organization to engage in collective bargaining; so it cannot be said that they have no personal rights secured by the NLRA. *See also NLRB* v. *Magnavox Co.*, 415 U.S. 322, 326 (1974) (Section 7 rights of employees to solicit each other about whether to have a bargaining representative may not be waived by their union, even if the waiver were limited to workers supporting the union, "[f]or employees supporting the union have as secure §7 rights as those in opposition."); *Brown* v. *Hotel Employees*, 468 U.S. at 503 ("Section 7 guarantees *to employees* various rights, among them the right 'to bargain collectively through representatives of their own choosing.'") (emphasis added); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972) (the

[10] "Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 248 (1970). This point was relied upon by the Court in *Gateway Coal*, 414 U.S. at 382.

Section 7 "guarantee includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves.").

The Commissioner has relied on *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975) to support his view that only employers and labor organizations have rights secured by the NLRA. This case is beside the point. In *Emporium Capwell*, a group of employees was denied the protection of the NLRA for its effort to compel the employer to bargain with it on the issue of racial discrimination, separate from the exclusive collective bargaining representative. Here, all Livadas did was to have an exclusive collective bargaining agent and have a collective bargaining agreement including arbitration negotiated through her union. The Commissioner refused to help her with her claim because of these things she did in concert with her fellow employees, not because of any individual action she took. When she sought late-payment penalties under the Labor Code, she did not seek to circumvent her bargaining agent; she was simply claiming the benefit of the State's minimum labor standards.

The Commissioner conditioned Livadas's access to his enforcement services on her not having exercised her NLRA rights to select a representative and bargain through that representative for a contract containing arbitration, pursuant to his established policy not to take claims on behalf of *any* employees covered by collective bargaining agreements with arbitration clauses. This was a deprivation of Livadas's NLRA rights, which the Court of Appeals should have permitted the District Court to remedy under §1983. Instead, it found reasons why nothing should be done for Livadas under §1983; the reasons are fully at odds with NLRA and §1983 law.

IV. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT CAL.LAB.CODE §§201 AND 203 ARE MINIMUM LABOR STANDARDS WHICH THE COMMISSIONER IS NOT PREEMPTED FROM ENFORCING

A. *Metropolitan Life* and *Fort Halifax* Hold that Substantive Employment Laws Such As Cal.Lab.Code §§201 and 203 Are Not Preempted

Labor Code §§201 and 203 are part of the minimal labor standards established by the State of California. The Court has held that such minimal labor standards are not preempted under *Machinists* analysis, *see Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. at 753-758, or under the pre-emption analysis in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *see Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. at 22 n. 16. The Court pointed out that the NLRA was enacted against the backdrop of myriad state laws setting minimum labor standards. *See Metropolitan Life*, 471 U.S. at 756. Cal.Lab.Code §§201 and 203 were among the laws "then in existence" when the NLRA was passed[11]. The purpose of the NLRA is to provide for the process of collective bargaining, not to legislate its substantive results. The Court concluded that Congress intended that the substantive employment law of the States would continue in effect. *Id.*, 471 U.S. at 755-56.

[11] The predecessor to §201 was enacted in 1911. It provided that a discharged employee must be paid all accrued wages immediately. Violation was a misdemeanor, punishable by a fine not to exceed $500. 1911 Statutes of California, ch. 663, pp. 1268-1269. In 1915, the predecessor to §203 was added, providing a penalty measured by the employer's length of delay. 1915 Statutes of California, ch. 143, p. 299. In 1919, the law was further amended. The provisions for immediate payment of discharged employees and for penalties when payment is delayed were reenacted, and among other things, a new provision was added providing, "It shall be the duty of the commissioner of the bureau of labor statistics to inquire diligently for any violations of this act, and to institute the actions for penalties herein provided, and to enforce generally the provisions of the act." 1919 Statutes of California, ch. 202, pp. 294, 296.

The persisting state law provides both protections for employees, *cf. id.*, as well as the employer's general right to run the workplace as it wishes, *see Fort Halifax*, 482 U.S. at 21. These "[m]inimum state labor standards affect union and non-union employees equally, and neither encourage or discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life*, 471 U.S. at 755. "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. " *Id.* at 757. "Furthermore, pre-emption should not be lightly inferred in this area since the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax*, 482 U.S. at 21. *Accord*, *Lingle*, 486 U.S. at 412.

It cannot be questioned that Cal.Lab.Code §§201 and 203, and §98, for that matter, are minimum labor standards within the meaning of *Metropolitan Life* and *Fort Halifax*. These statutory provisions fit in this category at least as well as the legislation involved in those other cases. In *Metropolitan Life*, collectively-bargained health insurance plans were required to have certain mental health benefits prescribed by the State. Thus, the content of the employees' health plan became a mix of what state law required and what the parties bargained. The Court found that the state law was not preempted by federal labor law. *Id.*, 471 U.S. at 758. In *Fort Halifax*, the Court held that Maine's plant-closing law was a minimum labor standard and therefore not preempted by the NLRA, even though the Maine law had an explicit cognizance of the collective bargaining process, and provided that the statutory provisions could be superseded by a collectively-bargained alternative. *Id.*, 482 U.S. at 21. In both those cases, then, there was far more involvement or entanglement between state law and the collective bargaining process than there is here. By contrast, Cal.Lab.Code §§201 and 203 operate in total independence from the collective bargaining process. They do not intrude substantive terms into an area commonly dealt with in collective bargaining, as in *Metropolitan Life*, and they are not conditioned on what happens in

collective bargaining, as in *Fort Halifax*. Instead, they are employee protection statutes, minimum labor standards, in the purest sense. They simply provide that when an employee loses gainful employment and faces the world without income, at least she will receive immediately what she earned up to that time. These statutes are "a valid and unexceptional exercise of the [State's] police power." *Cf. Metropolitan Life*, 471 U.S. at 758.

B. The Court Of Appeals' Decision That The Commissioner Should Not Enforce State Minimal Labor Standards Violates This Court's Teachings

The decision of the Court of Appeals is completely contrary to *Metropolitan Life* and *Fort Halifax*. If generally followed, it would make those decisions into museum pieces, because what was not preempted under *Machinists* or *Garmon* would be preempted under §301. If state minimum employment standards are preempted solely because a collective bargaining agreement providing for arbitration exists, then these minimum standards laws will be preempted for most union workers most of the time. They would be eliminated almost as effectively as if the Court had held in *Metropolitan Life* and *Fort Halifax* that these laws were preempted under *Machinists* or *Garmon*. The rule in those cases would be limited to operation only when no agreement was in effect.

In *Metropolitan Life* and *Fort Halifax*, the Court spoke broadly about the absence of preemption. "[T]he mandated-benefit law as applied to a plan negotiated pursuant to a collective-bargaining agreement subject to the NLRA is not preempted by federal labor law." *Metropolitan Life*, 471 U.S. at 758. "[T]he Maine statute is not preempted by the NLRA." *Fort Halifax*, 482 U.S. at 22. Collective bargaining agreements were in effect in both cases. *See Metropolitan Life*, 471 U.S. at 748; *Fort Halifax*, 482 U.S. at 5. Nothing was said about §301 preemption, even to reserve any points about it. It apparently never occurred to anyone that these sweeping decisions could be largely nullified by this other branch of preemption analysis. There was no reason for this thought to

occur, either. In neither of these cases were the state laws dependent on interpretation of collective bargaining agreements. This is obviously so in *Metropolitan Life*. It may superficially appear less true in *Fort Halifax*, because the operation of the statute was affected by the result of collective bargaining. Still, no interpretation of the collective bargaining agreement was required in *Fort Halifax*. If the employee was covered by an express contract providing for severance pay, regardless of the terms, the statutory benefits were not payable. *See Fort Halifax*, 482 U.S. at 4 n.1. Section 301 preemption was therefore appropriately not an issue in that case. Here, in a case involving what is every bit as much a state minimum labor standard, the Court of Appeals majority elevated a non-issue into a rule that would swallow the Court's previous decision.

Moreover, the decision of the Court of Appeals not only defeats the holdings in *Metropolitan Life* and *Fort Halifax;* it is directly contrary to them. The Court of Appeals held that the Commissioner should not enforce a minimum labor standard such as that contained in Cal.Lab.Code §§201 and 203 if the claim "even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." Pet. App. 14a. This "theory of quasi-preemption," as Judge Kozinski characterized it, Pet. App. 18a, defies this Court's instruction in *Fort Halifax* that "preemption should not be lightly inferred in this area." *Fort Halifax*, 482 U.S. at 21. The Court of Appeals majority does not even appear to have realized that it was dealing with minimum labor standards, for it did not refer to either *Metropolitan Life* or *Fort Halifax* in the course of its opinion.[12] By reversing the Court's instruction in *Fort Halifax*, and adopting a presumption in favor of preemption of minimum labor standards claims instead of against it, the Court of Appeals majority created the inversion of logic and justice the Court warned against in *Metropolitan Life:*

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[12] Both the District Court and Judge Kozinski understood that Livadas's claim was in this category. *See* Pet. App. 45a-48a; 19a.

> It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non-union employers.

471 U.S. at 756. That is exactly the inversion here. In California, employees who have chosen to exercise their Section 7 rights to join a union and negotiate a collective bargaining agreement containing arbitration are penalized by being deprived of the Commissioner's enforcement on their behalf of Cal.Lab.Code §§201 and 203.

The inversion of this Court's rulings by the Court of Appeals is all the more striking when it is remembered that the plaintiff in *Fort Halifax* was Maine's Director of the Bureau of Labor Standards, who had brought suit on behalf of the packing company's employees to recover for them the statutory plant-closing benefits. *See Fort Halifax*, 482 U.S. at 5. The benefits were measured by the employees' rates of pay, which were established by the collective bargaining agreement. *Id.* at 4 n.1. In the present case, Livadas sought to compel the Commissioner to do exactly what this Court approved in *Fort Halifax*, and the Court of Appeals majority held it was proper for the California Commissioner to *refuse* on preemption grounds. If this case had come up instead as an effort by the Commissioner to enforce Cal.Lab.Code §§201 and 203 on behalf of Livadas, and the employer had defended on grounds of preemption, *Fort Halifax* would have obviously been controlling in all respects; indeed, on the authority of *Fort Halifax*, the employer's argument would have been frivolous. This shows how extreme was the departure of the Court of Appeals from this Court's teachings, and how clear it is that there was no rational basis for thinking that an enforcement action by the Commissioner would be preempted—even arguably so.

V. THE COMMISSIONER'S POLICY IS NOT JUSTIFIED BY THE PRINCIPLES OF §301 PREEMPTION

A. Under *Lueck* and *Lingle*, Livadas's Claim Was Not Preempted

The only connection between Livadas's claim for late-payment penalties and the collective bargaining agreement was that the agreement provided her wage rate. J.A. 16-17. Moreover, there was never any question about the amount Livadas was owed. When she filed her claim on January 9, 1990, she stated that she had received her final pay check by mail at home on January 5. J.A. 18. She made it clear she was satisfied with the amount she was paid, and that her claim was only for penalties, because of the late payment. Under "amount due or balance claimed," she put, "Penalties only." *Id.* The last line of her "Brief Explanation Of Issues" was, "I am claiming penalties from 1/2/90-1/5/90." *Id.* Thus, Livadas's claim involved absolutely no interpretation or even mechanical application of the collective bargaining agreement. The amount of her final pay was never in question, only the time it was paid. As the District Court explained, "[i]t requires reference only to a calendar, not to the [union contract], to determine that the statute was violated and penalties are due." Pet. App. 41a.

The Commissioner refused to consider enforcing Livadas's claim, pursuant to his policy not to do so for employees covered by collective bargaining agreements with arbitration. He explained to Livadas that quantifying the amount of penalties due her would require looking in the agreement for her wage rate. J.A. 16.

However, "[n]ot every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted by §301 or the provisions of the federal labor law." *Allis-Chalmers* v. *Lueck*, 471 U.S. 202, 211 (1985). Only "state law rights and obligations that *do not exist* independently of private agreements, and that as a result can be waived or altered by agreement of private parties,

are preempted by those agreements." *Id.* at 213 (emphasis added). The question is whether a claim is "inextricably intertwined" with the terms of the collective bargaining agreement. *Id.* at 213. No principle of federal labor law preemption stops the operation of state law merely because the employee who invokes it is covered by a collective bargaining agreement with arbitration or because that agreement contains data needed to calculate the amount of a claim. Section 301 preemption only precludes a state-law claim when its resolution is substantially dependent on an analysis of the collective bargaining agreement, *see id.*, 471 U.S. at 220, *not* every time interpretation or application of a collective bargaining agreement would be involved, and certainly not every time the collective bargaining agreement supplies data such as employees' wage rates. This Court has made this clear:

> A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. [cit. om.] Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise preempted, would stand.

Lingle, 486 U.S. at 413 n. 12.

If the Commissioner were right that a claim is preempted simply because it is necessary to look at the collective bargaining agreement to find an employee's wage rate, then Congress has unknowingly made unionized employees legal pariahs. Any union member's tort claim—even against a tortfeasor who was a stranger to the collective bargaining agreement—would be preempted if lost wages were an element of damages. All state social welfare schemes where benefits are based on wages, such as workers' compensation

laws[13], would be preempted by §301. As a result, the Commissioner has not merely "misapprehend[ed] the precise location of the boundaries between state and federal power," *cf. Golden State II*, 493 U.S. at 114 (Kennedy, J. dissenting), but has adopted a policy affecting virtually all workers in California under collective bargaining agreements, which draws a line so far from the federal-state frontier that no reading of existing law could justify it.

The Court of Appeals imported into §301 preemption analysis an analog of the "arguably protected or prohibited" test under *Garmon*. Pet. App. 14a. This Court has never intimated that this is an appropriate method of applying §301 preemption. Indeed, just the opposite is evident from all of the Court's cases in this area. Section 301 preemption extends only so far as is necessary to insure that collective bargaining agreements are enforced in accordance with principles of federal law. It does not clear away any extra space around it. Otherwise, *Lingle* could not have been decided as it was. There, the employer argued that its actions were taken in accordance with rights given to it under the collective bargaining agreement. *See Lingle*, 486 U.S. at 401. Resolution of the employee's claim *arguably* would have involved some reference to the agreement. The same was true of the economic damages sought by the employee in *Lingle*, which would be measured by the pay rate in the agreement.

The Court of Appeals' "arguably preempted" test for preemption would therefore have produced a contrary result had it been applied in *Lingle*. Federal preemption under §301 cannot rely on such a vague principle, particularly where that principle defeats the purposes of federal law.

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[13] For example, California workers' compensation laws base an injured worker's benefits on wages, which would be derived from a collective bargaining agreement in the case of unionized workers. *See* Cal.Lab.Code §§4451 *et seq.* (West 1989).

B. The Commissioner Is Completely Mistaken In His View That The Existence Of An Arbitration Clause Somehow Makes A Difference For §301 Preemption

The Commissioner's misunderstanding of federal labor preemption runs deep. He argues that his policy would not prevent the agency from enforcing the rights of a worker under a collective bargaining agreement *without* an arbitration clause. Brief In Opposition, pp. 3-4. But §301 preemption applies where there is a collective bargaining agreement *regardless* of whether it has an arbitration clause. In *Lucas Flour*, the Court explained that the purpose of §301 preemption was not necessarily to promote arbitration, but to avoid "the possibility that individual contract terms might have different meanings under state and federal law." 369 U.S. at 103-04. The possibility of such conflicting interpretations "might substantially impede the parties' willingness to agree to contract terms providing for final arbitral *or judicial* resolution of disputes." *Id.* (emphasis added). *Accord, Lueck*, 471 U.S. at 210; *NLRB* v. *C&C Plywood Corp.*, 385 U.S. 421, 426, 429 n. 15 (1967) (if suit for violation of the collective bargaining agreement, which had no arbitration provision, has been brought in court instead of unfair labor practice charges being filed, the suit would have been governed by federal law); *Humphrey* v. *Moore*, 375 U.S. 335, 344, 345 n. 8 (1964) (federal law applies under §301 to interpret collective bargaining agreement, and interpreting scope of arbitration clause is for the courts, not the arbitrator); *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 23-28 (1962) (§301 governs strike settlement agreement with no arbitration clause). Section 301 preemption is not a matter of allocation of jurisdiction, but the choice of law to govern collective bargaining agreements. Both state and federal courts have jurisdiction under §301 but apply only federal law. *See Teamsters* v. *Lucas Flour*, 369 U.S. at 101-04. Sometimes the courts defer to arbitration, as in *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 264 (1962), but other times they do not. *See e.g.*, *Local Union No. 721, United Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 252- 253 (1964) (employer's claim for damages for breach of no-strike clause).

This misunderstanding on DLSE's part shows that its policy is based on an unthinking fixation on the existence of an arbitration clause in a collective bargaining agreement, rather than sensitivity to federal labor preemption. By its own profession, it is apparently willing to interpret and apply collective bargaining agreements without limit as long as they do not contain an arbitration clause. As a practical matter, the fixation with arbitration wins out, because almost all collective bargaining agreements provide for arbitration.

C. It Is Not Too Hard For The Commissioner To Enforce The Labor Code For Employees Like Livadas While At The Same Time Following This Court's Guidance On The Limits Of §301 Preemption

Faced with his staff's perceived inability to properly apply federal labor law preemption principles, the Commissioner adopted a prophylactic, general rule that if the agency has to look to a collective bargaining agreement for *any* information, it will reject the employee's request for help. If he insisted on a rule that could be applied with no thought, he could as easily have chosen to seek enforcement of *all* claims by employees covered by collective bargaining agreements with arbitration—that is, treating them the same as all other employees without discrimination—and let the courts tell it which ones were preempted. This is the only acceptable course under §1983, *if* thoughtful application of §301 preemption doctrine is ruled out. The course the Commissioner has chosen penalizes employees like Livadas, whose claims are not preempted, because they have exercised their federal rights. The other course risks defeat on preemption grounds for some claims, but does not jeopardize federally-protected rights, inasmuch as there is no such right to be free from attempted enforcement of state minimum labor standards laws, as *Metropolitan*

Life and *Fort Halifax* show. As between two overly-broad courses, state and local officials must pick the one that does not injure federally-protected rights.[14]

Of course, nothing in the Court's decisions requires the Commissioner to adopt such drastic, overbroad policies. They allow him to think about these preemption questions. Some may be difficult, but most are simple, as this case demonstrates. Just reading *Lingle* should have been enough to reveal that all claims like that of Livadas were not preempted by §301. The same is true of late-payment claims where the lateness is undisputed but there is some question how much was due; *Lingle*, 486 U.S. at 413 fn. 12, describes how state agencies and courts should handle such claims. For whatever claims which may not fit into these categories, the Court has provided a test. A claim is preempted only if its existence, not its measurement, can only be resolved by interpreting the collective bargaining agreement; that is, that it is "inextricably intertwined," *Lueck*, 471 U.S. at 213, with the provisions of the collective bargaining agreement.

Thus, the dilemma the Commissioner fears is illusory. Employee rights under state minimum standards laws can be enforced without interfering with the uniform interpretation of collective bargaining agreements and without undue difficulty.

VI. IT IS NO DEFENSE THAT CAL.LAB.CODE §229 IS VALID ON ITS FACE

A. An Application Of A Valid Statute Which Deprives Federal Rights Is Remediable Under §1983

Another key misunderstanding by the Court of Appeals majority was that "a misinterpretation of a perfectly valid state statute, however, does not provide grounds for federal

[14] It just so happens that in choosing between Scylla and Charybdis, the policy adopted by the Commissioner favors the employer over the employee every time, despite the fact that the primary intended beneficiary of *both* the NLRA and Cal.Lab.Code §§201 and 203 is the employee.

relief." Pet. App. 12a. From this premise, the Court of Appeals reasoned that all the Livadas complained of was a misinterpretation of a valid statute, and therefore her only redress was to try to correct the misinterpretation by bringing an action in state court under state law.[15]

Section 1983 is not limited, however, to attacks on the facial validity of statutes. *See Monroe* v. *Pape*, 365 U.S. at 476-484; *Zinermon* v. *Burch*, 494 U.S. 113, 124-25 (1990). Section 1983 is available to correct the misinterpretation of state law by state officials, where the misinterpretation causes a deprivation of federal rights.

> There can be no doubt at least since *Ex Parte Virginia*, 100 U.S. 339, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of the State and represent it in some capacity, whether they act in accordance with their authority or misuse it. [citation omitted].

Monroe v. *Pape*, 365 U.S. at 171-172. "[I]n many cases there is 'no quarrel with the state laws on the books,' *Monroe* at 176; instead, the problem is the way those laws are or are not implemented by state officials." *Zinermon*, 494 U.S. at 125.

Federal labor preemption takes the same approach. Issues of preemption are not resolved by looking to see whether the state law in question is one that is general or special to labor relations. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U.S. at 292. *Accord*, *Wisconsin* v. *Gould*, 475 U.S. at 289.

[15] The Court of Appeals majority minimized the Labor Commissioner's action by suggesting that he merely guessed wrong on the question whether Livadas's claim was preempted. This is, however, exactly what the Los Angeles City Council did in *Golden State*. In a single instance involving a single entity, it withheld a government benefit, on the erroneous but honest belief that it had the power to do so. It guessed wrong on preemption, and for this had to pay damages. The guess was a much tougher one than here, where the preemption question has a clear answer.

In both *Monroe* v. *Pape* and *Zinermon*, §1983 was invoked to remedy official actions that were not in accord with valid state laws. In *Monroe* v. *Pape*, the state laws actually prohibited the officials' abuse of power.[16] *See* 365 U.S. at 183. In *Zinermon*, the officers did not violate state law, but violated federal civil rights in applying an otherwise valid statute. *See* 494 U.S. at 135-36.

There are many other examples. For instance, in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), the Court held that Maine's interpretation of a provision of federal law concerning Aid to Families with Dependent Children worked a deprivation of rights under that same law. There was no question of the validity of the law that state officials were applying, but only of the way they applied it. *Id.* at 3. In *Nash* v. *Florida Industrial Commission*, Florida had a provision in its unemployment compensation law that disqualified claimants unemployed due to a "labor dispute." *See* 389 U.S. at 236-37. The validity of the statutory disqualification provision itself was not in dispute. The administrative agency interpreted it, however, to disqualify a worker who filed an unfair labor practice charge with the NLRB over her discharge. *See id.* at 237. The Court held that "the Florida Unemployment Compensation Law *as here applied*" was preempted because the State penalized conduct protected by federal law. *Id.*, 389 U.S. at 240 (emphasis added). In *Golden State* itself, the Los Angeles City Council acted under the authority of a "perfectly valid" charter provision. The relevant section of the city charter provided:

> The city may, by ordinance, . . . grant to the holder of such franchise a new franchise to replace such franchise about to expire.

[16] But Section 1983 "does not draw any distinction between abusive and non-abusive federal violations." *Collins* v. *City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1065 (1992).

Golden State Transit Corp. v. *City of Los Angeles*, 686 F.2d 758, 760 (CA9 1982), *cert. denied*, 459 U.S. 1105 (1983), quoting Los Angeles City Charter §3, sub. div. 8(D). Nothing was wrong with the legislation, only with its application in a particular instance.

B. In Livadas's Case, The Commissioner Acted Pursuant To An Established—and Defective—Policy

Besides missing the point that §1983 applies to remedy situations where misapplications of valid state laws deprive people of their federal rights, the Court of Appeals majority mischaracterized what the Commissioner has been doing. It stated that the Commissioner's policy is that he "has conditioned his enforcement on his determining the claim would not be preempted by federal labor law." Pet. App. 12a. In another formulation, the Court of Appeals stated that the "Commissioner's position . . . is that enforcement not require the interpretation or application of a collective bargaining agreement. That condition is perfectly permissible under federal law." Pet. App. 11a. This statement is factually incorrect, because the Commissioner's policy was to deny its services to any employee covered by a collective bargaining agreement containing an arbitration clause, period. *See ante* at 10-12. It is also legally incorrect. Section 301 preemption does not occur whenever there is "interpretation or application" of a collective bargaining agreement. It only occurs "when a resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220. This Court has specifically held that mere "application" of the terms of a collective bargaining agreement does not result in Section 301 preemption. *Lingle*, 486 U.S. at 413 n.12.

This case does not involve "random and unauthorized departures from otherwise unimpugned and established state procedures." *Cf. Zinermon*, 494 U.S. at 140 (O'Connor, J., dissenting). At issue in this case is the Commissioner's statewide, established procedure of not enforcing *any* claims by

employees who are covered by collective bargaining agreements containing arbitration. The policy itself is defective. *Cf. Monell*, 436 U.S. at 694. Livadas was only one of its victims, although hers is a good example because no thinking application of federal preemption law could have resulted in the conclusion that her claim was preempted. Nor is this a case of a mere "misapprehension of the boundary between state and federal power" or the "State's quite innocent mistaken judgment respecting the shifting boundary between two sovereign powers." *Cf. Dennis* v. *Higgins*, 498 U.S. 439, 451 (1991) (Kennedy, J., dissenting). After *Metropolitan Life*, *Fort Halifax* and *Lingle*, no doubt remained that state minimal labor standards laws are not preempted. The Commissioner's *real* policy, as he has admitted it to be, makes no attempt whatsoever to incorporate the principles of these cases into even a rough test for field application. Instead, he continues to use a test which is based solely and entirely on whether an employee has exercised her rights under the NLRA.

Ironically, the result of granting Livadas the relief she seeks in this case would be to *free* California officials to fully implement the State's longstanding minimal labor standards. Enforcement of these standards on behalf of all California employees has only been interrupted by the Commissioner's false notions of the limits imposed upon him by federal labor preemption.

VII. NO REASON EXISTS FOR FEDERAL COURTS TO ABSTAIN AND TO RELEGATE LIVADAS TO STATE COURT PROCEEDINGS

A. The Court of Appeals Decided That Abstention Was Necessary, Without Mentioning Or Applying Abstention Doctrine

The Court of Appeals held that Livadas should have been relegated to state court remedies, namely, a petition for writ of mandamus to compel the Commissioner to take her claim. Pet. App. 12a. By reversing the District Court on these

grounds, the Court of Appeals effectively held that the District Court should have abstained from exercising its §1983 jurisdiction. The court did not mention the abstention doctrine, however. Instead, it invented a novel approach to the subject, without referring to *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) or *Younger* v. *Harris*, 401 U.S. 37 (1971) and without applying any of the principles of either branch of abstention analysis.

Livadas brought this action after the Commissioner summarily refused to take action on her claim without a hearing under Cal.Lab.Code §98(a). No proceedings were pending at the state level, let alone judicial proceedings. No state-law issues were involved, only the Commissioner's interpretation of the limits of his authority under federal law. There is no special state tribunal in either theory or practice which is specially concerned with working out how the California Labor Commissioner should perform his duties within the confines of federal labor law preemption. In fact, the only judicial proceeding the Court of Appeals was able to envision was the extraordinary writ of mandamus. Under established abstention analysis, not a single reason existed for the Court of Appeals' conclusion that abstention was appropriate in this case. Its refusal to allow the District Court to exercise its §1983 jurisdiction in this case was nothing less than an abnegation of the responsibility of the federal judiciary to exercise its jurisdiction given by Congress. *Cf. New Orleans Public Service*, 491 U.S. at 359.

The federal courts have the duty to exercise their jurisdiction, and the situations in which abstention is permissible have been carefully defined by this Court. *See New Orleans Public Service*, 491 U.S. at 359. Abstention remains "'the exception, not the rule.'" *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 236 (1984), quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976). *Burford* and *Younger* v. *Harris* define the two situations in which abstention is allowed.

B. No Abstention Is Appropriate Under *Burford*

The Court has defined the "*Burford* doctrine" in *New Orleans Public Service*, as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' [cit. om.]

491 U.S. at 361. None of these conditions exists here. ". . . *Burford* is concerned with protecting state administrative processes from undue federal interference. . . . " *Id.*, at 362. There is no such process here. There is only the extraordinary writ of mandamus. Cal.Code.Civ.Pro. §1085 provides:

> It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Unlike the tribunals with specialized knowledge in *Burford* and *Alabama Pub. Serv. Comm'n* v. *Southern R.R. Co.*, 341 U.S. 341 (1951), traditional mandamus[17] is a remedy gener-

[17] California law does provide for judicial review of adjudicatory decisions of state agencies through the writ of "administrative mandamus" Cal.Code Civ.Pro. §1094.5. But administrative mandamus will not lie unless the agency decision was "made as a result of a proceeding in which by law a hearing is required to be given. . . ." *Saleeby* v. *State Bar of California*, 39 Cal.3d 547, 560-61, 216 Cal.Rptr. 367, 374 (1985) A state agency's dismissal of an employment complaint without a hearing or taking of evidence may not be challenged through administrative mandamus. *See Mahdavi* v. *Fair Employment Practice Div.*, 67 Cal.App.3d 326, 333-334, 136 Cal.Rptr. 421, 424 (Cal.Ct.App. 1977).

ally available from any court of general jurisdiction, to remedy a wide range of acts, including those of private persons. Mandamus may be used for challenging the constitutionality or validity of statutes or official acts. *See Wenke* v. *Hitchcock*, 6 Cal.3d 746, 751, 100 Cal.Rptr. 290, 293 (1972). This power, however, has nothing to do with the nature of the claim or any specialized body of regulatory knowledge; it is universally available to all persons for all constitutional claims. If the federal courts had to abstain in deference to state courts' mandamus power, no federal court could ever issue a §1983 injunction against any state actor.

Moreover, proceedings in mandamus are limited. The California courts treat the Commissioner's decision as to which Labor Code to pursue as an unreviewable exercise of prosecutorial discretion. *See Painting & Drywall Work Preservation Fund, Inc.* v. *Aubry*, 206 Cal.App.3d 682, 686-87, 253 Cal.Rptr. 776, 777-78 (Cal.Ct.App. 1988). This treatment is similar to the way federal law treats the refusal of the General Counsel of the NLRB to proceed on an unfair labor practice charge. *Cf. NLRB* v. *United Food & Commercial Workers, Local 23*, 484 U.S. 112, 125-26 (1987). In both cases, the agency's refusal to proceed on a charge is not considered adjudicatory unless a formal hearing has been held. *Cf. id.* As with the General Counsel of the NLRB, the Commissioner's prosecutorial decision not to take further action prior to a hearing is judicially unreviewable. *Compare id. with Painting & Drywall*, 253 Cal.Rptr. at 777-78.

Beyond the nature of the state court proceedings that would be available here, which are far from adequate and do not involve any "state efforts to establish a coherent policy

with respect to a matter of substantial concern," the remaining reason for exercising *Burford* abstention is also absent. There are no "difficult questions of state law bearing on policy problems of substantial public import." All the questions involved here are federal ones. The only reason why the Commissioner has failed to enforce California law is his mistaken belief that *federal* labor law preemption prevents him from doing so whenever employees are covered by a collective bargaining agreement with an arbitration clause. The reason given by the Commissioner for rejecting Livadas's claim was not some fact specific interpretation of the California law, such as whether Livadas could afford to employ counsel or whether Safeway acted "willfully" when it failed to pay her upon termination. The Commissioner's only reason for refusing to help Livadas, as he has stated repeatedly, was based on notions of what federal preemption required.

C. No Abstention Is Appropriate Under *Younger*

The *Younger* v. *Harris* abstention doctrine also did not provide any grounds for the Court of Appeals' decision. First of all, *Younger* preemption applies where there are *pending* state proceedings. *See Younger*, 401 U.S. at 45; *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986). There were no pending state proceedings here, of any sort. The Commissioner simply refused to take Livadas's claim, and there were no further state proceedings. *Younger* does not require abstention to a mandamus proceeding in state court, because "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Public Service*, 491 U.S. at 368.

Furthermore, federal courts may not abstain in favor of state-law administrative proceedings that are not judicial in nature. *See New Orleans Public Service*, 491 U.S. at 369-70. If state law does not regard an administrative proceeding as judicial, then

the federal courts should not abstain. *See Hawaii Housing Authority*, 467 U.S. at 237-39. California law does not regard proceedings before the Labor Commissioner as judicial, even where the agency conducts formal hearings on a complaint. *See Triad Data Services, Inc.* v. *Jackson*, 153 Cal.App.3d Supp. 1, 14-15, 200 Cal.Rptr. 418, 426 (Cal.App.Div. 1984). "[T]he Labor Commissioner is a 'purely administrative officer with state-wide authority and possesses no judicial powers . . . '" *Id.*, 200 Cal.Rptr. at 426. In this case, there was certainly no adjudicatory proceeding on Livadas's claim. Prior to the February 7, 1990 no-action letter, the agency did not conduct any adversary proceedings, hold an evidentiary hearing, nor require service of process or an appearance by Livadas's employer. Livadas's only communication with the agency was her one-page intake report, J.A. 18; her only opportunity to discuss her union contract was her check-mark "Yes" to the form question "Was your job union?" *Id.*[18]

The Court of Appeals' deference to the California courts' mandamus remedy is also inconsistent with *Golden State*. The federal plaintiff in *Golden State* had a mandamus remedy in state court for the Los Angeles City Council's denial of its franchise renewal application.[19] Unlike Livadas, the taxicab

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[18] The Commissioner cannot camouflage his agency's exclusion policy by labelling it a "*sua sponte* dismissal on jurisdictional grounds." Brief in Opp. to Pet. at 12. The agency refused to proceed, not because of the unique facts of Livadas' complaint, but because of the agency's categorical rule excluding any claimant covered by a standard union contract. In effect, the Commissioner's enforcement policy imposes an "irrebuttable presumption" against such claimants. If that irrebuttable presumption penalizes the federal rights of state-law claimants, the federal courts must exercise §1983 jurisdiction to protect federal rights from the operation of the invalid state-law rule. *See D.C. Court of Appeals* v. *Feldman*, 460 U.S. 462, 487 (1983).

[19] The California courts have the power of administrative mandamus over local governments' decisions on applications for municipal franchises and licenses. *See Sierra Club* v. *City of Hayward*, 28 Cal.3d 840, 848-49, 171 Cal.Rptr. 619, 622-23 (1981); *City of Fairfield* v. *Superior Court*, 14 Cal.3d 768, 773 n.1, 122 Cal.Rptr. 543, 545 n.1 (1975).

company in *Golden State* received a hearing before the City Council before its application was denied. If the Court of Appeals was correct to insist that Livadas seek a traditional writ of mandamus, then the courts in *Golden State* should have required the taxicab company seek a writ of mandamus in the California courts to review the City Council's denial of its renewal application. It would be inconsistent to refuse federal relief to a §1983 plaintiff like Livadas, when the same remedy has been granted to the federal plaintiff in *Golden State*.

The Court of Appeals distinguished *Golden State* by reasoning that the City Council had explicitly defined an invalid condition on the franchise, while here the Commissioner only places the formally valid condition that Livadas's claim not be preempted by federal law. Pet. App. 10a-12a. This is not a durable distinction, because the Commissioner's policy is admittedly something different: that the claimant has not exercised her NLRA rights to negotiate through her representative a collective bargaining agreement containing arbitration. *Ante*, at 10-12. In this case, the Commissioner's policy is demonstrably invalid, despite his subjective belief that he is only following the dictates of preemption law. If the Commissioner can insulate his agency's policy from federal injunctive relief just by claiming mistaken fidelity to a general principle of law, then any state agency could use the same tactic to avoid a federal injunction.

For example, the City of Los Angeles could permissibly enact a city ordinance forbidding municipal franchises to be awarded in a way that would "interfere with the balance of power in a labor dispute." So long as the City professed to be applying this "perfectly valid" labor neutrality law to each employer's application, it could circumvent *Golden State* easily. The Court of Appeals' abstention rule would prevent the federal courts from interfering with the City's application of its facially valid local preemption law, even if its policy systematically barred applicants based on its skewed notion of labor preemption. This result would severely undermine the uniformity of federal labor law.

VIII. CONCLUSION

The judgment of the Court of Appeals should be reversed. This Court should reinstate the declaratory and injunctive relief ordered by the District Court, Pet. App. 49a-50a.

Before the Court of Appeals, Livadas stipulated that paragraphs 4 and 6 of the District Court's injunction, Pet. App. 49a-50a, may be deleted.[20] The remaining provisions of the District Court's injunction, at paragraphs 1-3, 5 and 7, should be reinstated by this Court.

Respectfully submitted,

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[20] Paragraph 4 of the District Court's order, Pet. App. 49a, orders the Commissioner to institute an action in the California state courts. Livadas concedes that the Commissioner may institute administrative proceedings to test the factual validity of Livadas's claim prior to instituting such an action. Livadas also acknowledges that paragraph 6 of the District Court's injunction, Pet.App. 49a, may contravene the Eleventh Amendment of the U.S. Constitution by requiring a state agency to pay compensatory damages. The remaining sections of the District Court's injunction do not offend the Eleventh Amendment, because they constitute declaratory and injunctive relief against a state agent in his official capacity. Such relief which does not violate the Eleventh Amendment, *see Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Quern* v. *Jordan*, 440 U.S. 332, 346-349 (1979).

STATUTORY APPENDIX

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, provides in relevant part:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. §173(d) provides in relevant part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Civil Rights Act of 1871, 42 U.S.C. §1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District

> of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Cal.Code Civ.Pro. §1084 and 1085 provide:

> §1084.
> The writ of mandamus may be denominated the writ of mandate.
>
> §1085.
> It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Cal.Lab.Code §90.5(a) provides:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

Cal.Lab.Code §98(a) provides in relevant part:

> The Labor Commissioner shall have the authority to investigate employee complaints. The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner including orders of the Industrial Welfare Commission, and shall determine all matters arising under his or her jurisdiction . . . . Within 30 days of filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held, or whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint. If the determination is made by the Labor Commissioner to hold a hearing, the hearing shall be held within 90 days of the date of that determination. . . .

Cal.Lab.Code §98.3(a) provides in relevant part:

> The Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and the Labor Commissioner believes have claims which are valid and enforceable. . . .

Cal.Lab.Code §201 provides in relevant part:

> If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

Cal.Lab.Code §203 provides in relevant part:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of

> an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days.

Cal. Lab. Code §229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

No. 97-1028

In the Supreme Court
of the
United States

OCTOBER TERM, 1997

KAREN LIVADAS

Petitioner,

vs.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE RESPONDENT ON THE MERITS

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QUESTIONS PRESENTED

1. If a state, which has a strong public policy encouraging arbitration, grants a limited exception to that policy for the purpose of allowing unrepresented workers to avoid mandated arbitration in claims covering certain state wage payment laws, may the state law granting the exception also limit that exception in the event that the employee is employed under the terms of a collective bargaining agreement which contains an arbitration clause?

2. If the answer to question 1 is yes, may the state adopt a test less expansive than that required by federal caselaw for determining the limitations on the state courts or a state agency when entertaining claims by workers employed under the terms of a collective bargaining agreement or must the state apply the tests developed by federal caselaw to enforce § 301 preemption?

3. If the state must utilize the federal § 301 preemption tests to determine its jurisdiction, was the dismissal of Livadas' claim required under those principles?

4. Has a state agency which exercised its discretion in attempting to determine the thin line between state and federal power where a collective bargaining agreement is involved, violated the federal rights of a worker whose wage claim it has rejected and is that violation cognizable under 42 U.S.C. § 1983?

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In the Supreme Court

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OCTOBER TERM, 1993

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT ON THE MERITS

I. INTRODUCTION

A. *Facts*

On January 2, 1990, Karen Livadas, a grocery clerk employed by Safeway Stores, was terminated by her employer. The undisputed facts established in the summary judgment

proceedings in the District court for the Northern District of California revealed that Ms. Livadas requested, and was refused, all pay due her at the time of the discharge. (J.A. 27) Ms. Livadas was told by her manager at Safeway that he did not have payroll records at the store and that he could not provide her with any pay at that time but that Safeway would mail her check to her. Ms. Livadas received her check for final wages on January 5, 1990. (J.A. 14) According to the affidavit of Ms. Livadas, neither she nor Safeway Stores disputed the amount of the final wages she received on January 5, 1990. (J.A. 14)

On January 9, 1990, Ms. Livadas filed a claim with the District Office of the Division of Labor Standards Enforcement[1] in Napa, California. In the claim form, Ms. Livadas explained the issues involved in the claim as follows:

> "I was terminated from employment on 1/2/90. At that time I requested all monies due me to date. Shane Ryan, Mgr, told me 'I can't cut you any money, they will probably mail a check to your house, that's how Safeway does it.' I subsequently did receive the check via mail to my home on 1/5/90. I am claiming penalties from 1/2/90 - 1/5/90." (J.A. 18)

In her original claim Ms. Livadas indicated that the final wages she had received were as follows: 24 hrs. @ $13.78; 125[2] vacation hrs. @ $13.78 for a total of $2112.49.

---

[1]The California State Labor Commissioner is the chief officer of the Division of Labor Standards Enforcement (DLSE). The terms Labor Commissioner, Labor Board, and Division of Labor Standards Enforcement are commonly used interchangeably to describe the state agency.

[2]The number of vacation hours on the claim form differs from that Ms. Livadas put in her affidavit filed in the District court. The wages received,

(continued...)

Labor Code § 201 provides that an employee is entitled to receive all earned wages at time of discharge. The willful failure to pay all earned wages at time of discharge pursuant to § 201 may result in the imposition of penalties under the provisions of Labor Code § 203. Livadas sought to recover the § 203 penalties only (J.A. 18).

There is no evidence in the record detailing the investigation conducted by the Napa District Office of the California Labor Commissioner regarding the claim filed by Ms. Livadas. However, it is clear that the information accumulated by the assigned deputy was not based simply on the fact that Ms. Livadas had marked the box "union" on her claim form as alleged by Petitioner[3]. (See Brief For The Petitioner, pp. 3-4) On February 7, 1990, Deputy Labor Commissioner J. Aceves addressed a letter to Ms. Livadas which explained that as a result of the provisions of California Labor Code Section 229, the DLSE would be unable to proceed with her claim. (J.A. 16-17) The letter detailed the facts that the Deputy had as-

---

[2](...continued)
according to the affidavit of Ms. Livadas, were in the total amount of $2112.49. This represented 128.5 "days" (she obviously meant "hours") vacation at $13.78 per hour, 24 hours worked in the previous week at $13.78 per hour, plus a 50 cent per hour shift differential for an unknown number of hours. (J.A. 14) The figures, of course, do not compute with the facts given. If the 50 cent shift differential was paid for all of the hours in the previous week, Ms. Livadas should have received $2113.45. While the differences are *de minimis* they do illustrate the problems involved in determining the wages due under the terms of the CBA.

[3]At footnote 3, page 4 of her Brief, Livadas alludes to the fact that counsel for the Division had referred to a copy of the CBA obtained from Livadas' counsel. Without belaboring a legal point which would appear to be evident, Commissioner points out that the sheparding declaration referred to the source of the document simply to allay any objection based on foundation.

sembled to that point and, based on those facts, explained the reasons why the California Law precluded the DLSE from processing Livadas' claim:

> "Labor Code Section 203 requires that the wages continue at the 'same rate' until paid. In order to establish what the 'same rate' was, it is necessary to look to the collective bargaining agreement and 'apply' that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit." (J.A. 16)

The collective bargaining agreement under which Livadas was employed provided for at least eight separate job classifications. Detailed contractual definitions of each of these classifications were contained in the CBA. (See note, J.A. at 3) The CBA also provided, among other benefits, for bonus pay (J.A. 13), termination pay[4] (J.A. 2), night premium (J.A. 9), shift differential (J.A. 8), and overtime compensation provisions.

There is no evidence in the record regarding possible defenses to the imposition of penalty wages which may have been available to Safeway Stores. A number of defenses to the willful failure to pay the wages due in a timely manner might rely on subsequent events. For instance, one defense to the imposition of penalty wages would be that the employee was ultimately reinstated with full back pay. However, as explained, *infra*, Commissioner's motion to join Safeway was denied by the District court and any valid defenses which the

[4]The CBA provides (J.A. 2) that if an employee is not given specified notice of termination, the employee must be given the equivalent pay. This pay in lieu of notice provision does not operate, however, if the discharge is for "cause".

employer could have raised are not a part of this record[5].

In addition to the above, the collective bargaining agreement also contained provisions which could require interpretation and or application of the CBA in order to reach the conclusion that the wages were, in fact, "due" or whether the failure to pay the wages was "willful"[6].

Livadas alleged that the largest portion of the sum due to her at time of termination represented vacation wages. The CBA provides that the parties were bound by the terms of the Northern California Retail Clerks Union-Employers Vacation Fund and Plan. (J.A. 11) The provisions of California Labor Code §227.3, which specifically exempt collective bargaining agreements, would preclude the application of the California law and require that the inquiry regarding the vacation wages

[5]Despite the fact that Commissioner was not allowed to join Safeway, the District court's judgment required the Commissioner to pay any penalty Safeway would have been assessed in the event that Safeway raised the defense of the statute of limitations contained in the CBA. It appears now that even Livadas agrees that the District court exceeded its jurisdiction in this regard. (See fn. 20, p. 43 of Petitioner's Brief)

[6]The definition of the term "willful" as it is used in Labor Code § 203, is found at Title 8, California Code of Regulations ("C.C.R."), §13520:

> "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> "a) Good Faith Dispute. A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute'."

be based entirely on the terms of the collective bargaining agreement.

B. *Proceedings Below — The District Court*

On February 16, 1990, Ms. Livadas filed an action in the District court for the Northern District of California for declaratory relief, injunction, and relief under 42 U.S.C. §1983. The Labor Commissioner answered the complaint on March 6, 1990, stating that the decision not to proceed further on Ms. Livadas' claim was based upon the Labor Commissioner's policy. (Answer of Labor Commissioner filed March 6, 1990, p. 4, ¶ 5)

On March 30, 1990, the Commissioner moved the court to join Safeway Stores and Local 373, United Food and Commercial Workers Union, AFL-CIO as additional parties. The motion to join the additional parties was denied by the District court. Possible defenses which Safeway Stores may have been able to raise are not a part of this record.

Cross motions for summary judgment were filed by the parties and on October 12, 1990, Judge Henderson of the District Court granted Livadas' motion for summary judgment. In its decision, the District court addressed both the applicability of 29 U.S.C. §1983 to the issues in this case and the question of the validity of the Labor Commissioner's actions.

The District court concluded that Livadas had "a private right of action under §1983 to bring this case as an individual to vindicate her NLRA rights from interference by the state." (Pet. 32a) The District court conceded that DLSE based its refusal to "prosecute" Karen Livadas' late wage payment on California Labor Code §229. (Pet. 39a) Despite the fact the court recognized the DLSE position, Judge Henderson held:

> "The short answer is that preemption doctrine is a matter of federal, not state law. A primary purpose of preemption doctrine was to maintain a uniform federal labor law doctrine and to protect federal NLRA rights. Insofar as § 229 and the State's interpretation of it in *Howard* goes beyond the limits of federal preemption doctrine, it is invalid. The DLSE must provide the benefit of enforcement of the wage payment statute to all employees unless the federal preemption doctrine *requires* the State to deny enforcement of the wage payment provision to union members working under a CBA." (Pet. 39a)

The District court, in explaining its rationale, stated that:

> "The defendant argues that enforcement of the state provision at issue for employees working under a CBA would be 'inextricably intertwined with consideration of the terms of the labor contract.'"

However, according to the District court, in this case:

> "The simple question of whether the statute was violated can be determined wholly independently from the CBA. Karen Livadas was not paid until three days after her termination. It requires reference only to a calendar, not to the CBA, to determine that the statute was violated and penalties are due."

The District court then held, as a matter of law, that:

> "California Labor Code §§ 201 and 203 establish timely payment of final wages as a minimum term of employment for all workers, just as the statute in *Metropolitan Life*[7] established mental health care as a minimum term of employment in Massachusetts." (Pet. 47a)

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[7]*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)

Thus, the District court concluded:

> "[t]he state may not deny enforcement of that benefit only to workers who are parties to a CBA with an arbitration clause. *A fortiori*, the State is clearly not preempted from providing this benefit to employees who work under CBA's." (Pet. 47a)

C. *Proceedings Below — The Ninth Circuit*

Judge Rymer, writing for the majority of the Ninth Circuit, determined that the right which Livadas was asserting was not an individual right to bargain with her employer, but that "[t]he right she asserts is simply to be allowed to participate in her union's collective bargaining activity." Consequently, the Ninth Circuit concluded Livadas had a right under the National Labor Relations Act to "engage in collective bargaining, and §1983 therefore provides a remedy for a deprivation of that right." (Pet. 7a)

However, unlike the District court, the Circuit court concluded that the Commissioner's policy, as set forth in the letter to Livadas written on February 7, 1990,

> "[I]s not to enforce any claim that concerns the interpretation or application of any collective bargaining agreement containing an arbitration clause, pursuant to California Labor Code § 229. He [the Commissioner] then interpreted § 229 to preclude enforcement in Livadas' case because deciding her § 203 claim would require applying her collective bargaining agreement, which contains an arbitration clause." (Pet. 8a)

The majority opinion speaks of the contentions made by the Commissioner throughout the proceedings. Judge Rymer recognized that the Commissioner had argued that it was the

state law[8] (§229) upon which the Commissioner relied in refusing to process the claim of Livadas[9]. The Circuit majority further noted that it was the position of the Commissioner that the state law was consistent with the federal principles of preemption and that the Commissioner was not relying upon the doctrine of federal preemption to justify his refusal to process the claim. (Pet. 9a)

The majority held that what Livadas was really challenging was the application of the California rule to her case. The Court concluded:

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[8]Commissioner concedes that the Court's conclusion in the first paragraph on page 10a of the Petition to the effect that the "Commissioner's policy of not enforcing claims that concern the interpretation or application of collective bargaining agreement containing arbitration clauses is thus based on the idea that such enforcement would be preempted by federal law" is not consistent with this view. A fair reading of the statement of the Court on page 9a, however, will reveal that this was not the argument put forth by the Commissioner and, indeed, it was not necessary to raise the question of federal preemption in order to sustain the Commissioner's position. The Commissioner only raised § 301 in response to the position of Livadas that federal law preempted the Commissioner's enforcement policy.

[9]Aside from the statements contained in Petitioner's Brief which are taken out of context and, therefore, misstate the position taken by the Commissioner (see pages 10 and 11 of the Brief of the Petitioner), Livadas fairly bases some of her contentions on the statements of the District court. However, the findings of the District court, to the extent that they allege that the Commissioner based its dismissal of Livadas' claim on federal law, are mistaken. A cursory review of the record will reveal that the Commissioner has consistently taken the position that "Simply stated, DLSE policy is based on its lack of authority under California law to determine 'claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing [such] an arbitration agreement." (See Commissioner's Points and Authorities in Opposition To Plaintiff's Motion For Summary Judgment And In Support Of Defendant's Counter Motion, p. 4, ll. 7-11)

"Simply because the Commissioner (arguably) erroneously determined that her claim would be preempted does not invalidate the condition he placed on his enforcement." (Pet. 12a)

Judge Kozinski, writing in dissent, viewed the case in substantially the same light as the District court, concluding that a "court could find that the employer did not pay her immediately upon termination—and thus violated the statute—without ever looking at the CBA."

The dissent recognized that under the California law the Labor Commissioner "does have a good bit of discretion whether to press a particular employee's claim" and points out, that the "Commissioner must also resolve an important question of state law: Does the employee have a valid (and enforceable) claim[10]?" (Pet. 16a) According to Judge Kozinski's dissent, had the Commissioner refused to enforce Livadas' claim based upon his finding that the employee does not have a valid claim, "this would have been purely a matter of state law and not the proper subject of a federal action." Judge Kozinski's analysis fails to note, however, that the provisions of Labor Code § 98.3(a) also mandate that the Commissioner exercise his or her discretion to determine whether the claim is "enforceable."

[10]Judge Kozinski cites to Labor Code §98.3 in the paragraph above and is obviously referring to that statute in reference to the discretionary decisions which must be made by the Commissioner. When Judge Kozinski speaks of determining whether the claim is "valid" he is citing to the provisions of Labor Code §98.3(a) which give discretion to the Labor Commissioner to determine if, in his "judgment," the claimant cannot afford counsel and the claim is both "valid and enforceable."

II. ARGUMENT

A. *Summary Of Argument*

The position of the California Labor Commissioner remains unchanged from the outset of this litigation. Generally, California state law requires that parties who have entered into agreements which provide for arbitration must exhaust these arbitration procedures. The provisions of California Labor § 229, a state law of general application, provide an exception[11] to the firmly-established state public policy favoring arbitration. The granting of this exception to that policy in Labor Code § 229 amounts to adoption by the state of a minimum labor standard for, as the legislature recognized, were such an exception not provided, workers employed under contracts containing an arbitration agreement would not be able to bring actions to enforce these wage provisions.

The state has limited the exception to its established public policy of strictly enforcing arbitration agreements to those employees who are in most need of protection from over-reaching employers. The statute is designed so that the exception from mandatory arbitration is not effective in the event the dispute involves the interpretation or application of any collective bargaining agreement which contains an arbitration agreement. The collective bargaining agreement exception to § 229 contained in the second sentence leaves parties engaged in arm's-length negotiations free to fashion their own remedies.

In reviewing Labor Code § 229, the California courts have defined the terms "application" and "interpretation" for

[11]This exception from mandatory arbitration is limited to disputes to enforce the provisions of Labor Code §§ 200-243 which deal generally with the time, place and manner of the payment of wages.

purposes of that section. The state definition of "application" for purposes of § 229 would preclude the Labor Commissioner from applying the wage rate contained in the CBA to determine the wages due. However, as discussed, *infra*, even if the federal definition developed under § 301 preemption principles and urged by Livadas is required to be used by the state, dismissal of this action was still appropriate.

State minimum labor standards such as § 229 escape preemption. Additionally, as the Court held in *Fort Halifax Packing Co. v. Coyne* 482 U.S. 1 (1987), a state has the right to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment. Just as Congress has recognized that *some* minimum standards may be, under certain circumstances, proper subjects of collective bargaining (29 U.S.C. § 207(b)), so too may the state, as a sovereign, choose to allow parties to a collectively bargained agreement to negotiate as to certain minimum labor standards which are not subject to negotiation by non-represented employees.

As this Court has consistently held, a state law is presumed to be valid and absent explicit evidence that it burdens federal rights, it must be held non-preempted. *Belknap v. Hale*, 463 U.S. 491, 501 (1983). Section 229 is certainly not inconsistent with the federal policy underlying the National Labor Relations Act encouraging arbitration and there has been no logical argument made in these proceedings which would lead to the conclusion that the statute directly interferes with the collective bargaining process.

Further, even if this Court were to conclude that the California law which the Labor Commissioner enforced did violate Ms. Livadas' federally protected rights, such state action in determining the fine line between federal and state power does not state a cause of action under 42 U.S.C. § 1983.

B. *Finding That State Law Is Preempted Requires Analysis Of The Intent Of Congress And Effect Of The State's Regulation On The Federal Statutory Scheme*

In reviewing cases under the preemption doctrine, this Court has "consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be preempted, and where there is no actual conflict between what federal law and state law prescribe...have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 479 U.S. 1, 6 (1986). If Congress has explicitly mandated preemption, the Court's job is easy. *Shaw v. Delta Air Lines, Inc.*, 462 U.S. 218, 230 (1983).

Preemption may also be found when there is outright or actual conflict between federal and state law, *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

As will be discussed in detail, *infra*, the Commissioner submits that the state law which was the basis for the dismissal of Livadas' claim (§ 229) is a minimal labor standard which initially provides California workers with protection from employer imposed arbitration and limits that protection to those workers which the legislature has determined are in most need of such protection. Absent the provisions of Labor

Code § 229, any employee working under the provisions of an employment contract containing an arbitration clause would be precluded from bringing an action in court or a complaint before the Labor Commissioner.

It is well-established that the NLRA does not protect the right of a worker or his employer to a particular result when negotiating an agreement; the Act simply guarantees the right to "reach such an agreement fairly." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 752. California law does not interfere with the bargaining process in any way but, in fact, encourages the parties to bargain free of state intrusion into these areas. Certainly, under the California law, the employee may complain that the limitations of section 229 preclude the bringing of certain actions before the Labor Commissioner if the employment is subject to a CBA with an arbitration agreement; but all minimum labor standards involve some limitation of the parties' rights.

The State of California, in adopting § 229, has made a conscious decision to protect the interests of those workers who most need the protection, while allowing the parties involved in arm's-length negotiations to provide their own remedies. This legislative decision reflects the finding that (1) represented employees working under the terms of a CBA containing an arbitration clause have less need for the protections afforded by sections 200 through 243 of the Labor Code, and (2) that the strong public policy of the State of California in favor of arbitration should be fully implemented in situations where parties of equal bargaining power have so chosen. These legislative conclusions do not preclude the parties from negotiating to provide a remedy within the CBA which would allow the chosen arbitrator to decide these issues of state law. Nor does § 229 preclude the parties from negotiating their own versions of the protective Labor Code

sections if they so desire. In the alternative, the parties may wish to bargain for a CBA which does not contain an arbitration clause leaving the resolution of disputes to the courts and, of course, to the Labor Commissioner. However, failing an agreement, the "backdrop of state law" remains intact.

What either of the parties may obtain in return for one or the other of these alternatives in the way of concessions from the other party is the very nub of the collective bargaining process. It is this very process which California law allows to flourish.

1. *The NLRA Contains No Explicit Congressional Mandate Requiring Preemption Of Section 229*

The provisions of the National Labor Relations Act involved in this case neither contain explicit pre-emptive language nor otherwise indicate a Congressional intent to usurp the entire field of labor-management relations. As the Court has noted on more than one occasion, "The national... Act...leaves much to the states, though Congress has refrained from telling us how much." *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984).

The Solicitor General of the United States appearing as *amicus curiae*, suggests that the Court should review this case under the most careful scrutiny provided in *Brown v. Hotel & Restaurant Employees*. However, the facts and the issues raised in the *Brown* line of cases[12] are easily distinguishable and such strict review is not merited.

The Court in this case is not faced with the situation in

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[12]*Hill v. Florida*, 325 U.S. 538 (1945) and *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

Nash v. Florida Industrial Commission, supra, 389 U.S. 235, where the Florida interpretation of its unemployment insurance law threatened withdrawal of benefits simply because a unionized employee filed an unfair labor practice charge against his or her employer. The reaction by the State of Florida was a direct and obvious interference with a right of any employee to bring charges of unfair labor practices to the National Labor Relations Board. Nor is the Court faced with the even more onerous state restrictions found in *Hill v. Florida, supra*, 325 U.S. 538, which required licensing of union officials and thus directly interfered with the process whereby the employees chose their representatives.

While one may sympathize with the position of the State of New Jersey in *Brown, supra*, the requirement that the unions file annual statements and imposition of qualification criteria on officials of those unions was a direct affront to the principles of free choice of bargaining agent. The rejection by the Court of the "balancing test" applied to those state laws which fall within the so-called "local interests" exception to the preemption doctrine was required by the facts and the issues raised. *Brown, supra*, 468 U.S. at 502. But, in this case, neither Livadas nor any of the *amicus* in support of her position can point to any violation of an *actual federal protection* in this case.

None of the state laws (or interpretations of state law) outlined in the cases above could conceivably be viewed as anything other than an exercise of power inconsistent with the basic premise underlying the National Labor Relations Act. Each of the state laws in the cases cited by the United States, in effect, "retard, impede, burden, or...control, the operations of the constitutional laws enacted by Congress." *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819)

Unlike the state law in the cases of *Brown* or *Hill* or

Nash, supra, the California law at issue here (§ 229) does not impact on the rights of parties to bargain to any greater degree than any other minimum labor standard adopted by a state. The provisions of Labor Code § 229 not only allow the parties to the collective bargaining agreement to freely negotiate but encourage such negotiations by protecting the ultimate agreement from state law intrusion.

2. *Labor Code § 229 Was Designed To Protect California Workers Likely To Be Exploited By Employers As A Result Of An Unfair Bargaining Position*

There is nothing in the decisions of this Court which would support the position taken by the United States in its Brief in Support of Certiorari that since an employer may not deny an employee a benefit to which she is otherwise entitled, a state cannot do so. Common sense would dictate that the state is not in the same position as an employer. The state, "by its grace" may grant a protection to any group it finds needs such protection while withholding that protection from another group. So long as there exists a rational basis for such "disparate" treatment, the action of the state does not offend the Constitution.

It would make little sense to allow the state, as the sovereign, the opportunity to adopt minimum standards to address particular evils, but so restrict the state legislature that the minimum standard may not be limited specifically to the evil to which it is addressed.

The public policy of the State of California is to encourage arbitration; not simply arbitration within the employment context—but all disputes between parties. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; 10 Cal.Rptr.2d 183, 186; 832 P.2d 899, 902. The first sentence of Labor Code § 229

provides a very limited exception to this public policy. The provisions of California Labor Code § 229 have been addressed by this Honorable Court on more than one occasion. Justice Blackmun, writing for a unanimous Court in the case of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1974), observed:

> "By the addition of § 229 to its Labor Code in 1959 California codified for the wage earner, with the solitary-collective bargaining agreement exception, a right of action to recover due and unpaid wages from his employer, regardless of the existence of any private agreement to arbitrate. [citations omitted] This was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance. The statute's legislative history is sparse, but the exception carved out for collective-bargaining disputes provides the obvious conclusion that it was the individual, nonunion, and otherwise unprotected[13] wage earner who was the intended beneficiary of the State's grace in providing this remedy." *Id.*, at 131.

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[13]Recently, the Ninth Circuit Court of Appeals in the case of *McCollum v. Roberts*, ___ F.2d ____, No. 91-35977 (9th Cir.1994) held that an Oregon law requiring paid rest periods which granted an exception to those employed under the terms of a CBA was preempted. The *McCollum* court, relying on Judge Kozinski's dissent in *Livadas v. Aubry*, noted that "[i]f Oregon's exclusion of unionized employees serves some other legitimate state function, then an argument can be made that its regulations could be justified." Commissioner submits that Labor Code § 229 does serve the legitimate state function of providing protection for those of its workers who are unrepresented, while providing the parties to collective bargaining agreements containing arbitration clauses the benefit of their bargain.

In summarizing the Court's decision, Justice Blackmun concluded that:

> "In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme."

As Justice Blackmun explained, in the first sentence of section 229, the California legislature has created a right for workers to bring actions to recover unpaid wages irrespective of the fact that the worker's employment contract may contain a binding arbitration agreement; and, in the second sentence of the same statute, limited that right. In addition, as this Court has recognized, there exists a rational basis for the actions taken by the state in balancing the needs of its citizens—a valid exercise of the state's police power.

However, the California legislature, in carving out the limited exception to the stated public policy encouraging arbitration, did not, as Livadas argues, so limit the remedial language of section 229 that it is directed solely to matters of union representation. The provisions of the section only apply if (1) there is a collective bargaining agreement containing an arbitration clause, and (2) the resolution of the dispute requires the *interpretation or application of the collective bargaining agreement*.

Though the Commissioner contends that given the legitimate state function which is the recognized basis for the statutory scheme, the State of California could adopt an exception to its minimum labor standard which specifically applied only to workers employed under the terms of a collective bargaining agreement, the provisions of § 229 are not

so designed. The language of the second sentence of § 229 is not a broad exception which applies to all unionized workers; nor does it even apply to all unionized workers who are employed under the terms of a CBA, nor even to all unionized workers who are employed under the terms of CBA which contains an arbitration clause. The exception contained in the second sentence of Labor Code §229 only applies where the dispute concerns the *interpretation* or *application* of a collective bargaining agreement which contains an arbitration clause.

This Court has already addressed the reasons the state adopted this policy and provided the distinction between the first and second sentences of §229: It was based upon the "obvious conclusion that it was the individual, nonunion, and otherwise unprotected wage earner who was the intended beneficiary of the State's grace in providing this remedy." *Ware, supra*, at 131. The statute is designed to specifically address an evil: The threat of an "exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance." This threat is not present in those cases where the employee is represented by a union and covered by the terms of a collective bargaining agreement. Rather, the California legislature concluded, in such cases the parties should be left free to negotiate.

Thus, as the California courts have determined, the plain language of the statute precludes the Labor Commissioner from entertaining claims such as that filed by Livadas.

In addition, as discussed *infra*, the legislature could have presumed that the parties may wish to negotiate the "benefits", the claim for which the individual employee may be precluded from presenting to the Labor Commissioner or the California courts.

3. *Provisions Of California Labor Code Section 229 Reflect State Minimal Labor Standards Which Are Consistent With The Principles Of Federal Law*

Labor Code § 229 is, at one and the same time, both a minimal labor standard and an exception to that minimal labor standard. The first sentence of section 229 provides a right to workers to bring actions in the California courts to enforce the provisions of Labor Code §§ 200 through 243[14] notwithstanding the existence of a private agreement to arbitrate between the worker and the employer. Remedial in nature, the statute has the effect of nullifying the terms of any private employment agreement requiring arbitration if the dispute concerns those Code sections.

The second sentence of Labor Code § 229 constitutes an exception to the remedial provisions of the first sentence limiting enforcement of "any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.[15]" This statement of state policy is entirely consistent with the provisions of federal law in the area of collective bargaining.

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[14]Section 229 confers upon the individual the right to bring an action to enforce the provisions of this "article" (Article 1 of Chapter 1, Part 1, Division 2 of the California Labor Code).

[15]The order of the Superior Court for the County of Santa Clara entered after remand from the Appellate Court in *Howard*, provides, *inter alia*:

> "State Labor Commissioner Robert E. Howard and Deputy Labor Commissioner Malvern Mayo, and their agents and representatives, are prohibited from enforcing or attempting to enforce any claim for wages involving a dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration provision..." (Exhibit 'B' attached to declaration of H. Thomas Cadell, Jr., filed in District court in support of motion to join additional parties)

As this Honorable Court held in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 727, "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act."

The decision of the California District Court of Appeal in the case of *Plumbing, Heating & Pipe Council of Northern California v. Howard* (1975) 53 Cal.App.3d 828; 126 Cal. Rptr. 406, details the state policy and points out that § 229 clearly precludes the Labor Commissioner from processing any dispute which requires the interpretation or application of the terms of a CBA containing an arbitration clause. It is this state-mandated policy to which the Labor Commissioner adheres and it was the application of the test dictated by this policy which led the Labor Commissioner to dismiss Ms. Livadas' claim.

Thus, it is the California state law, as announced by the California courts, which the Labor Commissioner utilizes in making its determinations in this area. The court in *Plumbing, Heating & Pipe Council of Northern California v. Howard, supra*, 53 Cal.App.3d 828; 126 Cal.Rptr. 406, explained the state law in this area:

> "The circumstances of the case at bench involve a dispute concerning the application of a collective bargaining agreement. Appellants assert that Craig's wage claim is covered by the Local 444 agreement, while Craig contends that the Local 393 agreement should control. As the Supreme Court stated in the case of *Posner v. Grunwald-Marx, Inc.* [(1961) 56 Cal.2d 169] at page 181: 'Any controversy under a collective bargaining contract which requires first a determination that the contract does or does not define the rights or duties of the parties in an existing situation is subject to arbitration if the agreement

> provides for the arbitration of disputes that arise out of the contract.' Furthermore, the facts of this case also involve the interpretation of a collective bargaining agreement. If it is determined that the Local 393 agreement is applicable, it will be necessary to interpret the provisions of that agreement to determine whether a foreman is required on a job involving fewer than three journeymen and apprentices." (Underlined emphasis added)

As the *Howard* court decision illustrates, the California state courts define the state law so as to preclude the *application* of the terms of the CBA to the dispute. This interpretation of the state minimum standard by the state court would mandate that under the state law, the trier of fact may not "apply" any of the provisions of the CBA to the dispute where the CBA contains an arbitration agreement.

For purposes of measuring whether a state-law cause of action is preempted by § 301 this Court, in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), held that "an application of state law is preempted by § 301...only if such application requires the interpretation of a collective-bargaining agreement[16]." The permissive language employed by the Court in *Lingle* at 413, fn. 12, appears to sanction application of the agreement's rate of pay and other economic conditions to determine damages in those situations where the state law is not preempted and the "worker has prevailed in a state-law suit." The *Lingle* Court did not address the situation where, as here, the state law precludes application of the

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[16]As discussed, *infra*, even if the criteria used by the Court to test the preemptive effect of the federal statute were to be used, the fact in this case would require that the Labor Commissioner must interpret the provisions of Livadas' collective bargaining agreement in order to enforce the state law penalty remedy available at Labor Code § 203.

terms of the collective bargaining agreement to any dispute.

Additionally, the *Lingle* Court's *dictum* in footnote 12 did not impose any duty upon a state to apply the terms of the CBA to its state law claims; the language is permissive, not mandatory and, as is evident by the language the Court employed, it was only the limited right of a state court to determine damages by applying the terms of the CBA which was discussed; but even this right was severely limited by the admonition that "federal law would govern the interpretation of the agreement to determine the proper damages."

4. *The Limitation Placed In The Second Sentence Of Labor Code § 229 Requiring Arbitration Reflects Both State And Federal Policy*

There can be no question of the intent of Congress in regard to the role of arbitration of disputes arising under the terms of collective bargaining agreements. Since the Steelworkers Trilogy this Court has made it abundantly clear that the provisions of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), were meant to effectuate a policy that "the means chosen by the parties for settlement of their differences under a collective bargaining agreement is [to] be given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960) The language of section 173(d) provides, in part:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the *application* or *interpretation* of an existing collective bargaining agreement..." (Emphasis added)

This Congressional mandate can be carried into effect most effectively only if the intent of the parties to collective

bargaining can be guaranteed. Where, as here, the parties have indicated that the question of arbitrability of disputes is to be resolved by the arbitrator (J.A. 11), the intrusion into this process by a state agency would truly be an interference with the collective bargaining process.

Indeed, this Court held in one of the companion cases in the Trilogy that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The provisions of Labor Code § 229 which preclude the adjudication of any dispute concerning the interpretation or application of a collective bargaining agreement are not in conflict with federal law. As this Court stated in *Fort Halifax Packing Co. v. Coyne* 482 U.S. 1 (1987):

> "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act."

The *Fort Halifax* Court further noted: "It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co. v. Coyne, supra*, 482 U.S. at 21. As in *Fort Halifax*, where the State of Maine provided an exception to the state-imposed severance pay where the "employee is covered by an express contract providing for severance pay"[17], here the State of

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[17] *Fort Halifax Packing Co., Inc. v. Coyne, supra*, 482 U.S. at 4, fn. 2.

California has provided access to the State Labor Commissioner and the California courts except where the worker is employed under the terms of a CBA which contains an arbitration agreement and the claim presented involves a dispute concerning the "interpretation or application" of the CBA. An even more limited exception.

AFL-CIO argues on behalf of Livadas that she has been denied her right to collectively bargain by the Labor Commissioner's policy, because the policy is only effective if there is a CBA and thus, is not a minimum standard. Actually, this argument is the same one presented by Fort Halifax Packing Company: "The statute at issue [here Labor Code § 229] is optional since it applies only in the absence of a collective bargaining agreement containing an arbitration clause and, therefore, cannot be regarded as establishing a genuine minimum labor standard." This argument was dismissed, without dissent, by the *Fort Halifax* Court and, for the same reasons, should be rejected in this case:

> "The fact that the parties are free to devise their own ...arrangement, however, strengthens the case that the statute works no intrusion on collective bargaining. Maine has sought to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment. *If a statute that permits* no *collective bargaining on a subject escapes NLRA pre-emption...surely one that permits such bargaining cannot be pre-empted." Fort Halifax Packing Co., supra,* 482 U.S. at 22 (Emphasis added)

It should follow, *a fortiori*, that an enforcement policy based upon a state law that does not conflict with federal law or policy and permits bargaining may not be viewed as violative of the rights which Livadas claims. It would test common sense to conclude that a state law which recognizes

and encourages the rights of the parties involved in a collective bargaining relationship to freely negotiate the terms and conditions of employment constitutes an infringement on the right of a union member to freely bargain.

C. *Both Livadas And The Solicitor General Err Regarding Effect Of California Law On The Bargaining Process*

The Petitioner and her *Amici*, the United States, contend that (1) the states are forbidden to enforce a law which would deny an employee a "benefit" to which she would be otherwise entitled because the employee is covered by a collective bargaining agreement; (2) the reason the Labor Commissioner refused to prosecute Livadas' claim was "simply because she was covered by a collective bargaining agreement with an arbitration provision[18]", and (3) since the Labor Commissioner's policy is "neither required nor permitted under federal law", the policy undermines employees' federally guaranteed rights to bargain collectively.

Livadas' contention, bottom line, is that the preemption doctrine used by the Court to prevent a state from adopting laws which would lead to entanglement with the collective bargaining process and thus interfere with the federal process must be turned on its head to require that the state law must require that state agencies and courts interpret and/or apply

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[18]Petitioner cites to the language in Commissioner's Brief In Reply To Brief For The United States as *Amicus Curiae* and contends that the statements made there are a concession. Far from it. Commissioner recognizes that a state law that, without rationale or reason, discriminates against a group of workers simply because the workers have exercised their right to collectively bargain would be preempted. But, as Judge Kozinski recognized in his dissent, if the state law serves some other legitimate state purpose a burden on the collective bargaining procedure is permissible.

the terms of a CBA despite a specific state law which prevents such interpretation or application.

The contentions of Livadas and the United States are flawed. In fact, the state does not share the position of the employer and an analogy based upon that premise is totally incorrect. Obviously, it is the state's duty is to protect the interests of its citizens and, through its police power, may adopt and enforce any laws not inconsistent with the federalist system to that end. Therefore, the state may "grant" a benefit to those of its citizens in need of that benefit and, at the same time, limit the application of that benefit in such a way that the evil that the "benefit" is designed to cure is addressed specifically, while preserving the general application of the law to other circumstances.

State legislatures have historically exercised the broad power to make classifications among their citizens as long as the classification exhibits some rational basis. As this Court held many years ago in addressing the right of the states to draw distinctions between classes of workers: "The Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed the clearest." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (Internal quotation marks omitted)

Again, as discussed above, the contention of the Petitioner and that of the United States to the effect that the Labor Commissioner refused to prosecute Livadas' claim "simply" because her employment was covered by a CBA containing an arbitration clause is a misstatement of the facts in this case. As the Circuit court clearly found, the Labor Commissioner refused to prosecute the claim based upon the fact that the resolution would require the application and interpretation of the CBA in violation of state law. Nevertheless, the Commissioner contends, the State of California

could distinguish the need for its protection based upon the fact that the worker was or was not employed under the terms of a collective bargaining agreement.

Finally, the contention that the policy of the Labor Commissioner is invalid because it is "neither required nor permitted under federal law" is simply not supported by the applicable law or the cases cited. The parties can point to no authority which holds that a state law which is consistent with federal law is preempted simply *because* it is consistent with federal law but is not required by that law. The law, in fact, is to the contrary; if, in fact, the state law is consistent with the federal scheme, there must be a showing that the application of the state law directly impedes the federal scheme. As detailed, *infra*, such a showing is not made.

1. *The State Has The Right To Adopt Minimum Labor Standards And The Concomitant Right To Limit Those Standards*

Livad as and her *amici* take the position that the state may not limit the right of non-represented employees and their employers to bargain regarding the imposition of an arbitration agreement while, at the same time, reserving to parties in a collective bargaining setting the right to negotiate freely. Insisting that the parties arbitrate their disputes is, according to Livadas, a form of invidious discrimination against employees covered by the terms of a collective bargaining agreement containing an arbitration clause. This position turns the concept of disparate treatment on its head.

Since this Court's landmark ruling in *Metropolitan Life Insurance Co. v. Massachusetts, supra*, there can no longer be any question tha. .he states have the right to adopt minimum labor standards which will be unpreempted by the provisions

of the National Labor Relations Act. *Metropolitan Life, supra,* 471 U.S. at 755. Usually, these "minimum standards" apply to all workers within the state, but as this Court noted in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 at 408, fn. 7 (1987):

> "While it may be true that most state laws that are not preempted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpreemption... a law could cover only unionized workers but remain unpreempted if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder." (Emphasis added)

A state law which distinguishes between represented and non-represented employees is not, *per se* disparate treatment. As this Court held in *Fort Halifax Packing v. Coyne, supra,* "Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Id.*, at 21. The collective bargaining concept which the NLRA protects, results in "give and take" on both sides of the table. The parties, aware of the provisions of the California law, may negotiate in view of that law.

The line of cases following *Golden State Transit v. City of L.A.*, 493 U.S. 103 (1989) are based upon *Machinists* preemption principles disallowing any state law which intrudes in an area of employer-employee relationship which Congress intended to be left wholly unregulated. If the principles announced in *Golden State* are extended to include any state law which "distinguishes" between represented and non-represented workers because, as Livadas and her *amici* argue, such differentiation *per se* impacts the worker's choice to be represented, the discretion of the state legislature to balance the needs of its citizens will be severely dilluted.

There exists legislation in California, for example, which prohibits the employment of workers in mines and smelters in excess of eight hours in any one day but, allows parties to collective bargaining agreements to negotiate a workday of up to twelve hours in a day[19]. Another, more recent enactment, permits parties to a collective bargaining agreement to negotiate for an alternate dispute resolution of workers' compensation claims thus bypassing the currently overloaded state workers' compensation hearing procedures[20]. In both of these cases the California legislature recognized that parties bargaining in arm's-length negotiations are better able to "frame their terms and conditions of employment to meet their particular needs" (See, Brief of AFL-CIO as *amicus curiae* in 86-341, *Ft. Halifax Packing v. Coyne* cited *infra*) than is the legislature. The assumption is that protections afforded by the collective bargaining process will insure that the interests of the worker will be safeguarded.

Section 229 at issue here does not "alter the economic balance between labor and management" (See *New York Telephone Co. v. New York Labor Dept.*, 440 U.S. 519, 532 (1979)), it, in fact, affects no economic interest and simply affords the parties the opportunity to negotiate against the "backdrop" of the valid state law. There is no showing that the State of California's strong public policy encouraging both collective bargaining and arbitration (*Plumbing, Heating & Pipe Council of Northern California v. Howard, supra,* 53 Cal.App.3d 828, 833-834; 126 Cal.Rptr. 406) is inimical to the federal policy nor that the provisions of § 229, adopted to further that public policy, interfere in any way with the right of workers to organize and collectively bargain.

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[19]Labor Code §§ 750 and 750.5.

[20]Labor Code § 3201.5.

The *amicus* brief of the American Federation of Labor-Congress of Industrial Organizations filed in support of the position of Livadas, while reaching a conclusion we believe is erroneous, addresses the issue faced by this Court and its ramifications in an intellectually honest discussion. The AFL-CIO recognizes the problems this case presents to working men and women represented by unions and covered by CBAs.

Being familiar with the briefs the AFL-CIO has filed in this Court in the past, Commissioner finds it difficult to understand how that organization does not agree with the State of California that the freedom to contract is of vital importance to the protection of the collective bargaining process and, in fact, should be the overriding concern of the Court. To paraphrase what the labor organization so eloquently stated as *amicus* in *Fort Halifax*:

> "Appellant [Livadas] contends...that [California] somehow ran afoul of the national labor policy by determining that rather than dictating a single policy applicable to all employers and employees, the state would allow employers and employees, union or nonunion, to contract out of the state-set [minimum labor standards found at Labor Code §§ 200-243]. Clearly, such a system has a less intrusive impact upon the bargaining process than a system of labor protections that does not permit waivers...Because the parties are 'permitted to set...a lower benefit level than that mandated by state law' (citing *Metropolitan Life*, 471 U.S. at 751), the parties have more room to frame their terms and conditions of employment to meet their particular needs than if only bargaining up is permitted." Brief of AFL-CIO as *amicus curiae* in 86-341, *Ft. Halifax Packing v. Coyne.*

No doubt, then, AFL-CIO found it difficult to distinguish this case from that of *Ft. Halifax* and that would explain the

statement of the *amicus* AFL-CIO in their brief at page 29 to the effect that "[f]or present purposes it is enough to note that as applied, Cal.Code § 229 has not been and cannot be defended on this or any other similar ground. The provision does *not* allow unionized workers collectively to decide to opt out of California's wage laws in preference to some other collectively bargained arrangement."

The argument which the AFL-CIO presented to this Court in *Ft. Halifax* didn't speak of the right to "opt in" or "opt out"; and this Court, in adopting the rationale suggested by the labor organization, discussed the concept only in terms of whether the parties should be free to "frame their terms and conditions of employment to meet their particular needs." Nevertheless, the AFL-CIO identifies a legitimate concern for, in fact, the federal laws which permit an exception from the overtime requirements for those employed under the terms of a collective bargaining agreement are couched in terms of an option. (See, 29 U.S.C. §§ 203(*o*), 207(b)(1) and (2) and discussion regarding Congressional intent, *infra*) Thus, the argument could be made that Congress would require the state provide an option. In this case, the state law does provide an option. Any workers employed under the terms of a CBA may collectively decide to opt out of the state imposed minimum standards contained in § 229.

This choice is not analogous to the allegory offered at page 29 of the *amicus* brief by the AFL-CIO regarding Mr. Hobson's choices. Here the workers' bargaining agent may choose the white horse (arbitration); or the black horse (no arbitration), or the bay (design their own minimum standards and remedies within the collective bargaining agreement); they need not take the horse closest to the door.

2. *The Limiting Of Remedial Legislation To Workers Who Are Not Protected By Collective Bargaining Is Commonplace And, In Fact, Endorsed By Congress*

The state, as sovereign, should be in the position to implement remedial legislation as it deems necessary, choose the class of individuals the legislation will protect, and so limit the legislation that it is directed to the specific evil. California's Labor Code § 229 is one of many state statutes which grant benefits to workers and then limit that benefit to those who are not covered by collective bargaining agreements. In California alone there are a number of such statutes or regulations concerning wages, hours and working conditions. There are, at the same time, a number of state minimum labor standards in California which do not offer an opportunity to negotiate and, thus, are not subject to limitation by a CBA. These latter statutes deal with protections the legislature believes are so necessary, so basic, that they should not be waived even through the collective bargaining process. These latter minimum standards, the state has concluded, are not to be used as "bargaining chips" in the give and take of negotiation.[21]

Some examples of California statutes which allow the parties to negotiate minimum standards are Labor Code § 204 which sets out the time periods within which wages must be paid (contains exceptions for workers covered by a CBA so as to allow the parties to negotiate different pay period arrangements); Labor Code § 227.3 which requires proration of vacation and forbids vacation policies which provide for a forfeiture of earned vacation pay is not effective in the event

[21]As examples, state-mandated minimum wages (8 C.C.R. § 11110 *et seq.*), exercise of political rights (Labor Code §§ 230, 1101) exercise of right to complain of safety violations (Labor Code §§ 6310, 6311).

the employment is covered by a CBA, and each of the California Industrial Welfare Commission Orders contain an exception to the stringent California overtime provisions if the worker is covered by a collective bargaining agreement that provides for a cash wage of at least $1.00 per hour in excess of the established state minimum wage and further provides for some premium rate for overtime hours.

The exception from the California daily overtime premiums contained in the Industrial Welfare Commissioner Orders is not unlike the maximum hours exception for workers employed under the terms of a CBA provided in the Fair Labor Standards Act at 29 U.S.C. § 203(*o*) (providing an exception to the "hours worked" definition) and § 207(b)(1) and (2) (carving out a limited exception to the overtime requirements)[22]. In carving out these limited exceptions to the overtime requirements of the FLSA, Congress has evidenced an understanding that workers covered by a CBA may not need the protections afforded to unrepresented employees. Congress has also evidenced a recognition of the fact that collective bargaining may, under some circumstances, waive "minimum standards" adopted by regulatory agencies. The prevailing rate of pay determined under the terms of the Service Contract Act may be negotiated by parties to collective bargaining agreements so long as the rate is at least the equivalent of the prevailing minimum wage adopted by Congress. (41 U.S.C. § 351(a)(1) and (2)). These exceptions illustrate the obvious conclusion that Congress did not envision

[22]Commissioner is aware of the language in *Metropolitan Life Insurance Co. v. Massachusetts, supra*, 471 U.S. at 755, which states: "Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing minimal employment standards." The provisions of 29 U.S.C. 207(b)(1)(2) provide, as do the provisions of Labor Code § 229, not for an exclusion, but for an option.

differentiation based on the fact that one is covered by a collective bargaining agreement as disparate treatment. More important, the exception evidences an intent by Congress that the parties to a collective bargaining agreement should be allowed to negotiate certain minimum standards when the statute provides the permission of the sovereign to do so.

D. *The Labor Commissioner Exercised Discretion Granted To The Agency Under State Law In Dismissing Livadas' Claim For Penalty Wages*

Judge Rymer's opinion in the Ninth Circuit correctly points out that the decision of the Labor Commissioner was based on the policy announced by the California courts which have considered the language of Labor Code § 229, *i.e.*, "not to enforce any claim that concerns the interpretation or application of any collective bargaining agreement containing an arbitration clause." The Ninth Circuit further recognized that the very language of the statute required the exercise of discretion by the Labor Commissioner. This exercise of discretion was, in fact, also mandated by the provisions of the California Labor Code which provides at Labor Code §98.3(a):

> "The Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and *the Labor Commissioner believes* have claims which are *valid* and *enforceable*." (Emphasis added)

Judge Kozinski's dissent in the Ninth Circuit opinion recognizes that pursuant to the provisions of Labor Code § 98.3(a) the Labor Commissioner has "a good bit of discretion whether to press a particular employee's claim" and points out that § 98.3(a) provides that "it is the Commissioner who must

determine under what circumstances an employee is deemed financially unable to employ counsel."

Judge Kozinski further recognizes that under §98.3(a):

> "The Commissioner must also resolve an important question of state law: Does the employee have a valid claim?"

Judge Kozinski then concludes that:

> "Had the Commissioner refused to enforce[23] Livadas' claim for either of these reasons, this would have been purely a matter of state law and not the proper subject of a federal action."

The Commissioner submits that Judge Kozinski's analysis is correct as far as it goes; the problem is: Judge Kozinski failed to consider all of the discretionary findings required by the state law. The "important question[s] of state law" which Judge Kozinski refers to are the issues which are addressed to the sole discretion of the Labor Commissioner by the provisions of the Labor Code §98.3(a). The analysis under that section must include not only the question of whether the Labor Commissioner considered whether the claim was *valid*, but also whether the claim was *enforceable*.

The Commissioner refused to enforce the Livadas claim because in his "judgment", based on state law (Labor Code §§

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[23]The "enforcement" of the Livadas claim has been the concern of both Judge Henderson in the District court and Judge Kozinski in his dissent. While it is possible that Livadas' claim (had it been processed) could have been "enforced" by the filing of an action under Labor Code §98.3(a), it is much more likely that the adjudication process provided in Labor Code § 98(a) would have been followed. It would not have mattered, however, which method was used, the Labor Commissioner, either through the assigned Deputy (J. Aceves in this particular case) or a Division Hearing Officer applying the Division policy as dictated by the California courts, would have reached the same conclusion.

98.3(a) and 229), the claim was unenforceable because it required the interpretation and/or application of the collective bargaining agreement. Judge Kozinski's analysis reaches an incorrect result because the analysis does not discuss this overriding issue.

E. *Public Policy Compels The Conclusion That The States Should Be Left Free To Design Remedies Which Give A Wide Berth To Drawing The Fine Line Between State And Federal Power*

While there is no evidence that the California Legislature intended the provisions of Labor Code § 229 to present a bulwark behind which the state's agencies and courts could hide to escape the necessity of drawing fine lines between federal and state power, it must be admitted that the statute does have that effect.

There appears to be little doubt that this Court recognizes that the determination of the fine line between state power and federal power for preemption purposes is a difficult one to draw. Justice O'Connor, after tracing the history of the issue, noted in the recent case of *New York v. United States*, ___ U.S. ____, 112 S.Ct. 2408, 2417 (1992):

> "...the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324, 4 L.Ed. 97 (1816), the Court has resolved questions 'of great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." (Emphasis added)

Judge Rymer, writing for the majority in the Circuit court,

foresaw the pragmatic results of a holding which required that the California State Labor Commissioner would be called upon to make these most difficult decisions on a day-to-day basis. The Ninth Circuit opinion stated that it was the belief of the majority that:

> "Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." (Pet. 14a)

This rationale reiterates the declaration of this Court in *United Steelworkers v. Warrior & Gulf, supra*, that arbitration will not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.*, at 582-583.

Judge Kozinski, writing in dissent, attacks this position as "a novel doctrine of quasi-preemption." Judge Kozinski's dissatisfaction with the majority's position in this regard, leads him to state that the role of the court is to "apply the laws Congress has written, not to guess what Congress 'presumably' would have wanted as to matters about which it did not legislate." (Pet. 18a) The Labor Commissioner submits that again, Judge Kozinski's analysis is incomplete; again, he fails to consider all of the issues.

Judge Kozinski's argument ostensibly begins with the premise that Congress did not specifically address the question of whether the states may adopt a law which provides that its courts should give a wide berth to questions of federal and state power. From this premise Judge Kozinski concludes that

the court has no right to conclude that in the event Congress had addressed the subject, Congress would have, in view of the primacy of the federal scheme for handling labor disputes, concluded that state officials should give wide latitude to adjudicating such disputes. What is not clear from Judge Kozinski's analysis is who, if not the courts, is to determine what Congress intended in this regard?

It is clearly the role of the judiciary to explain the intent (either explicit or implied) of the legislature. This intent must consider the basic intent of the statutory scheme coupled with the available caselaw. The conclusion of the majority that Congress would not have wanted state officials dealing in this area is supported by both the law and logic. It should follow, then, that a state law which, for whatever reason, requires state officials to defer to arbitration and adjudication under the federal scheme is consistent with the federal law (See *N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822, 838-839 (1983). This should be especially true where, as here, the CBA (See § 18.1) provides that the very question of the arbitrability of a dispute must be left to the arbitrator. (J.A. 11) Such a policy is not "a novel doctrine of quasi-preemption" but an enlightened doctrine of "quasi-abstention."

1. *Absent A Bright Line Test Regarding The Fine Line Between State And Federal Power There Will Be Increased Federal Review Of State Agency Decisions*

Unless this Court is able to formulate a bright line test regarding the distinction between which issues contained in a wage claim would be so intertwined with consideration of a collective bargaining agreement that federal policy would dictate preemption and which issues the state officials may apply, under federal labor law standards, in adjudicating the

complaint, the state agency's discretionary decisions will be the subject of actions for violation of the civil rights of either the employer or the employee. It is respectfully submitted, however, that such a bright line test is impossible to formulate. As Justice O'Connor noted in *New York v. United States, supra*, resolution of such questions of "great importance and delicacy" have led to some of the Court's "most difficult and celebrated" cases.

The Labor Commissioner's decisions regarding these important and delicate issues would, according to the District court, subject the Commissioner to review by the Federal judiciary on a case-by-case basis. An incorrect decision by the Commissioner in regard to these issues would subject the state to payment of attorney's fees pursuant to 42 U.S.C. § 1983.

Judge Rymer's decision obliquely addresses this obvious result and fashions a remedy which responds to the requirements of a federalist system. The Ninth Circuit correctly places the requirement for review of a state agency's decision which is based on an application of the state law, squarely where it should be: On the state courts.

The District court and Judge Kozinski in dissent both contend that the facts in this case do not require the interpretation of the collective bargaining agreement and that since the federal law would permit, pursuant to the language found in footnote 12 of the *Lingle* case, the application of the wage rate in the CBA, the Labor Commissioner has erred in refusing to prosecute Livadas' claim. For the reasons set out above, we, of course, disagree. But, assuming *arguendo*, that this Court were to agree with that assessment of the facts in this particular case, what of the next case?

The Commissioner submits that there is no bright line test that can be developed to be applied by state courts and

agencies which will discern the limits of federal and state power. Suppose, for example, that another worker employed by Safeway Stores under the terms of the CBA in question here files a claim. In this claim the Labor Commissioner is confronted with allegations that while the employee received some wages at the time of discharge, the amount received does not represent the full sum owed. Those allegations would state a valid claim for penalty wages pursuant to Labor Code § 203[24]. Suppose further that the underpaid sums which the employee alleges are due consist of vacation wages. It would clearly be necessary that the Labor Commissioner review the collective bargaining agreement and interpret and apply the terms of the agreement. Initially, it would be necessary to determine if there was an agreement to pay vacation wages and a perusal of the CBA would lead the Deputy Labor Commissioner to Section 11 of the contract. (J.A. 10) Then it would be necessary to apply that agreement to the controversy. Inasmuch as the provisions of California Labor Code §227.3 do not apply to collective bargaining agreements it would become necessary for the Deputy Labor Commissioner to apply "federal" common law contract theories to interpret the meaning of the vacation pay sections.

F. *The Facts In This Case Require Interpretation Of The CBA And Even Under Federal Preemption Principles Livadas' Claim May Not Be Maintained*

The Commissioner contends that the state should be free to apply state jurisdictional and procedural statutes in

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[24]Labor Code § 201 provides that the wages earned and unpaid at the time of discharge must be paid at that time. Section 203 states that the penalty is applicable if an employer willfully fails to pay, "without abatement or reduction" any wages of an employee who is discharged.

enforcing state law. The federal preemption principles are designed to establish limits on state jurisdiction vis-á-vis federal jurisdiction—not as procedural rules which the state must follow in establishing its internal jurisdictional limits. However, even if this Court were to find that it is necessary for a state to utilize federal preemption principles designed to limit actions which, arguably, arise under § 301 to determine the right of a party to bring an action to enforce a state-law remedy, Livadas' claim must fail.

In this case, in order to establish if Livadas received all the pay to which she was entitled, it would be necessary to establish whether the provisions of § 3.2 of the CBA (J.A. 2) apply in order to determine if Livadas received three days' notice of her termination. In the event three days' notice was not received, Livadas would be entitled to recover an additional three days' pay. Of course, if the discharge was for cause the three days' pay is not owed. Thus, if the employer raised the defense that the discharge was for cause, then the Labor Commissioner would have to determine if the discharge was for cause.

Since the penalty imposed by Labor Code § 203 is to reflect the workers' wage continuing "at the same rate," it is obviously necessary to establish what the "same rate" was. As the facts establish, Livadas herself gave two conflicting statements as to the correct hourly wage and neither of the statements can be correct according to the application of ordinary mathematics. (See fn. 2, *supra*) Livadas can be excused for this error, however. There are, in fact, eight separate wage rates covering separate classifications. Each of these classifications have detailed contractual definitions of their duties. Together with these separate wage rates are provisions for bonuses, shift differentials and night premiums which must be considered in determining the hourly rate of pay. It is

entirely conceivable that Livadas, herself, did not know what her hourly rate was at any given time.

Since the § 203 penalty is to continue at a daily rate, it will be necessary to establish the number of hours in a day which Livadas was scheduled to work. If she was a full-time employee she would be entitled to eight hours per day (J.A. 5, 9) unless, of course, the parties had agreed to a workweek of four ten hour days. (J.A. 5) On the other hand, if Livadas was a part-time employee, her hours would be subject to the provisions of § 4.10 of the CBA. (J.A. 4) If the final workweek included a holiday, the calculation is further complicated for part-time employees. (J.A. 4)

Suffice to say that the penalty wage due under § 203 can not be established simply by reference to a calendar as suggested by the dissent in the Ninth Circuit. A perusal of the CBA will illustrate the difficulties a Hearing Officer would encounter in simply establishing the proper penalty to apply if it could first be established that the failure to pay was "willful".

G. *42 U.S.C. § 1983 Should Be Unavailable As A Remedy When A State Official Simply Fails To Discern The Limits Of Federal And State Powers*

Livadas should not be allowed to maintain a § 1983 action against the Commissioner as a result of a recent line of decisions by this Court precluding such claims against state officials who exercise their decision-making discretion yet fail to discern the limits of that discretion because an obligation imposed on them by federal law is unclear.

Justice Kennedy, writing for the dissent in *Golden State I* noted that "[t]he Court should not interpret 1983 to give a cause of action for damages when the only wrong committed

by the State or its local entities is misapprehending the precise location of the boundaries between the state and federal power." *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 114 (Kennedy, J., dissenting) (1989). Section 1983 is not the appropriate remedy to redress a deprivation of an individual right when the correlative duty imposed by federal law on the official is vague, ambiguous or indefinite. "[T]he availability of the 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within the competence of the judiciary to enforce." *Id.* at 108 (citing *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 432 (1987).

1. *A 1983 Action May Be Maintained Only When A Federal Law Has Provided Specific Guidelines Imposing Binding Obligations On State Officials Clearly Narrowing The Discretion To Be Exercised*

The seminal decision by this Court establishing the rule that a 1983 suit is not maintainable when federal law does not explicitly and unambiguously limit the discretion that a state official might otherwise exercise is *Pennhurst State Sch. & Hosp. v. Haldeman*, 451 U.S. 1 (1981). The issue in *Pennhurst* was whether a mentally retarded person could bring a § 1983 suit against health officials because the Developmentally Disabled Assistance Act purportedly imposed an obligation on them to not dispense federal funds to institutions failing to provide "appropriate treatment in the least restrictive environment " to retarded persons. *Id.* at 17.

The *Pennhurst* Court held that as the purpose of the Act was only to "encourage, rather than mandate" better treatment of retarded persons, *Id.* at 20, no duty was imposed on health officials to ascertain before dispensing federal funds

whether an institution provided "the least restrictive treatment possible." *Id.* at 9. The Court concluded that the Act did not place an obligation on officials to "fund [only] certain levels of treatment," *Id.* at 20, because it "eschewed creating any specific guidelines." *Id.* at 56 (White, J., in a separate concurring opinion). Therefore, the Act failed to expressly limit the discretion wielded by health officials in disbursing funds to mental institutions and did not create a § 1983 cause of action.

Similarly, in the instant case, the NLRA does not provide "specific guidelines" for the Commissioner to determine whether federal law supplants a state law which prohibits him from representing a claimant employed under a collective bargaining agreement in a wage termination dispute. There certainly is no explicit directive under the NLRA that imposes a "binding obligation" on the Commissioner to contravene California law and represent such a claimant. *Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 512 (1990). Therefore, no federal law expressly and unambiguously restricts the Commissioner's discretion to comply with California law and not pursue Livadas' claim. Consequently, a 1983 suit against the Commissioner by Livadas is not a viable remedy.

Following *Pennhurst* the subsequent decision by this Court in *Wright v. City of Roanoke Redev. & Hous. Auth, supra,* held that a 1983 suit was a viable remedy against state officials because the federal statute imposed "specific and definable" obligations on the officials and circumscribed the discretionary authority they otherwise would have wielded. *Wright, supra,* 479 U.S. at 430. In *Wright* the Court held that tenants in low-income housing projects could maintain a 1983 action against housing officials who overbilled utilities and violated the rent ceiling provision of the Brooke Amendment to the Housing Act. The Court concluded that the provision entitling tenants to a "reasonable allowance for utilities" was not "vague and amorphous" but rather "specifically set out guidelines that [housing officials] were to follow in establishing utility allowances." *Id.* at 430. By adding a surcharge for excess utility use, housing officials acted outside their discretion and did not heed their obligation to make sure that tenants "pay only the prescribed maximum portion of their income as rent." *Id.* at 422. This dereliction of duty constituted a failure to act within precise discretionary contours shaped by federal law and enabled tenants "to bring [a 1983] suit in federal court to challenge [the] housing authorities' calculations of utility allowances." *Id.* at 426. The clearly defined obligations which limited the discretion housing officials could exercise in setting utility rates for public housing tenants contrasts with the lack of any clear federal directive restricting the Commissioner's discretion to conform with federal caselaw in pursuing a wage termination penalty claim by an employee who worked under a collective bargaining agreement.

Another case which arose subsequent to *Pennhurst* was *Wilder v. Va. Hosp. Ass'n., supra,* which raised the issue of whether health providers could bring a § 1983 suit against medical services officials for failing to adopt "reasonable and adequate" reimbursement rates. The *Wilder* Court held that although the federal law gave officials "flexibility" in setting rates, there were "factors which [officials] must consider in adopting its rates." *Id.* at 519. The Court concluded that these factors were an "objective benchmark" which let officials act with "discretion in choosing among reasonable methods of calculating rates" and gave courts a standard for "review[ing] whether the rates comply with the amendment." *Id.* at 520. Thus because the federal law identified a "range of reasonable rates," officials who set "rates outside that

range" acted outside their discretion and were thus subject to a § 1983 action.

By contrast, in the instant case, no "objective benchmark" is identified in the NLRA to inform the Commissioner that he is without discretion to refuse to represent Livadas in her penalty action against Safeway because federal labor law preempts such discretion. Indeed, if the state is required to utilize the tangled web of § 301 preemption principles each case would raise the threat of federal court review and possible damages under § 1983.

The most recent decision by this Court reaffirming the rule that a § 1983 suit is not maintainable when the federal statute does not provide "unambiguous notice" to a state official that a duty imposed by federal law curtails his discretion is *Suter v. Artist M.*, ___ U.S. ____, 112 S.Ct. 1360, 1366 (1992). The *Suter* Court held that a clause in the Adoption Assistance and Child Welfare Act requiring family services officials to use "reasonable efforts" to maintain and reunify families did not provide "unambiguous notice" that failure to use such efforts could result in a § 1983 cause of action. *Id.*, 112 S.Ct. at 1368. The Court stated that because no "statutory guidance [was] found as to how 'reasonable efforts' [were] to be measured" state officials could "comply with this directive, and with the other provisions of the Act, within broad limits." *Id.* Therefore, the Court concluded that the "'reasonable efforts' language [did] not confer an enforceable right upon the Act's beneficiaries" because the correlative duty imposed on the family services officials was too "generalized" to limit the officials' discretion. *Id.*, 112 S.Ct. at 1370.

Each of the above cited cases have involved Congress' spending power; a Constitutional issue which, of course, is not raised in the present case. However, the rationale for the rule

remains: absent a clear mandate to take definable action, the state official *must* exercise discretion in deciding whether state or federal law is applicable. While there is no argument that in cases involving the National Labor Relations Act the states are precluded from enforcing any state law which would directly interfere with the rights guaranteed by the Act, what is not nearly so clear is when does the right of a state to enforce its own law, derived from a valid exercise of its police power, directly interfere with the right of the parties to negotiate a collective bargaining agreement.

As this Court has recently noted, "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases" raising "questions of intricacy and nicety...in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *New York v. United States, supra*, ___ U.S. ____, 112 S.Ct. 2408 at 2417. Certainly, resolution of this amorphous issue with which even this Court has struggled should not subject state officials to actions alleging violations of civil rights.

III. CONCLUSION

The State of California has adopted a law which provides protection to its workers against over-reaching employers who would require that the contract of employment contain an arbitration clause which would preclude those workers from bringing actions to enforce the provisions of the California law dealing with time, place and manner of wage payment.

In adopting this minimum standard, the legislature, in view of the state's long-established public policy encouraging arbitration, chose to limit the right to bring independent

actions for enforcement of these wage laws only to those employees who, in the view of the legislature, were most in need of that protection. The legislature determined that those workers who collectively bargained with their employer did not need the protections afforded by § 229 and should be left in the same position as all other citizens of the state who are parties to contracts containing arbitration agreements.

The exception from the minimum standards of § 229 arises in situations where the worker is covered by a CBA with an arbitration clause and the claim requires either the interpretation or the application of the CBA. This exception facilitates two public policies of the state of California: the public policy which encourages arbitration and the announced policy of the state contained at Labor Code § 923 which encourages collective bargaining.

Respectfully submitted,

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APPENDIX

APPENDIX A

California Labor Code Sections/Regulations

Labor Code § 201: If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. An employer who lays off a group of employees by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment when the wages of said employees are paid within such reasonable time as may be necessary for computation and payment thereof...

(Note that sections 201.5 and 201.7 provide further exceptions to the immediate payment requirement for employees engaged in the motion picture and oil drilling industries).

Labor Code § 203: If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. No employee who secretes or absents himself to avoid payment to him, or who refuses to receive payment when fully tendered to him, including any penalty then accrued under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment.

Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.

Labor Code § 204: All wages, other than those mentioned in Section 201, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays...However, when employees are covered by a collective bargaining agreement that provides different pay arrangement, those arrangements shall apply to the covered employees.

Labor Code § 227.3: Unless otherwise provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

Labor Code § 229: Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

Labor Code § 750: The period of employment shall not exceed eight hours within any 24 hours and the hours of employment shall be consecutive, excluding intermissions for meals, for all persons who are employed or engaged in work in:

(a) Underground mines or underground workings.

(b) Smelters and plants for the reduction or refining of ores or metals.

Labor Code § 750.5: The provisions of Section 750 shall not prohibit a period of employment up to 12 hours within a 24-hour period when the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement where the agreement expressly provides for the wages, hours or work, and working conditions of the employees.

Labor Code § 923: ...[t]he public policy of this State is declared as follows:

Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor...in the designation of such representative or in self-organization or in other concerted activities for the purpose of collective bargaining...

Labor Code § 3201.5: [For purposes of complying with the workers' compensation provisions of the Labor Code]... the Department of Industrial Relations and the courts of this state shall recognize as valid and binding any provision in a collective bargaining agreement between a private employer or groups of employers in the construction, construction maintenance, and related activities and a recognized or certified exclusive bargaining representative that establishes...

(1) An alternative dispute resolution system governing disputes between employees and employers or their insurers that supplements or replaces all or part of [the workers' compensation dispute resolution procedures] ...Any system of arbitration shall provide that the decision of the arbiter or board of arbitration is subject to review by the [Workers' Compensation] appeals board in the same manner as provided [for any other workers' compensation claim].

California Industrial Welfare Commission Orders Regulating Wages, Hours and Working Conditions In The Mercantile Industry (Title 8, Calif. Admin. Code, § 11070, provide overtime protections to California workers employed in the retail food industry). § 11070(3) generally provides for premium rates for hours in excess of eight in any one day or forty in any one week. Subdivision (H) provides:

Except as provided in subsections (D), (E) [which deal with employment of minors] and (G) [dealing with eating facilities for employees], this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

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No. 92-1920

In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER,

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE
STATE OF CALIFORNIA,
RESPONDENT.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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No. 92-1920

In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
PETITIONER,

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE
STATE OF CALIFORNIA,
RESPONDENT

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REPLY BRIEF FOR THE PETITIONER

I. SUMMARY OF ARGUMENT

The Commissioner and the *amici* supporting him have not refuted Livadas' showing that the Commissioner's policy is preempted by federal labor law, as a direct imposition on NLRA §7 rights and as an interference in the collective bargaining process under *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). This case is controlled by the Court's decisions in *Golden State Transit* v. *City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989). Every condition for relief as set forth in those decisions is met here. This case is actually stronger because

(1) the federal rights secured to Livadas are specifically and definitely stated in the text of the NLRA, and (2) the Commissioner's refusal to take her claim was based on a general, state-wide policy, instead of being a single action taken in response to a particular labor dispute.

In tacit recognition of the fact that *Golden State* is indistinguishable except in ways that favor Livadas, the Commissioner and the *amici* supporting him avoid coming to grips with that decision. Significantly, none of them offers any defense of the reasoning used by the Court of Appeals majority to reverse the District Court's judgment for Livadas. Instead, they strike out in several different directions, each one requiring a radical revision of the law. The Commissioner and the Food Employers Council urge that the lowest-level Equal Protection analysis be substituted for the Court's established approach to labor law preemption, so that all the State needs to show is that it has a "rational basis" for depriving people of their NLRA rights. The Chamber of Commerce asks the Court to overrule *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21-22 (1987) and hold that a State may not impose substantive employment standards that must be obeyed by the parties to a collective bargaining relationship covered by the NLRA. The Employers Group argues that a State should be analogized to an employer with different units of employees, and that the Court should follow Labor Board precedent which allows an employer to give varying terms and conditions of employment to different units. One of the most remarkable things about this case is the prodigious number of disparate theories advanced to defeat Livadas' claim, all of which depart at acute angles from the mainstream of the development of the law.

II. THE COMMISSIONER HAS FAILED TO JUSTIFY HIS POLICY

A. The Commissioner's Policy Is To Reject All Claims From Employees Covered By Collective Bargaining Agreements Providing For Arbitration, Regardless Whether A Claim Depends For Its Resolution On The Interpretation Of A Collective Bargaining Agreement

Despite the Commissioner's many admissions that his policy is not to take claims from employees covered by collective bargaining agreements containing arbitration clauses (*see* Petitioner's Brief at 10-12), he and the *amici* supporting him now try to reformulate the policy in the hope of saving it. They want to qualify the policy by saying that it applies only when interpretation or application of the collective bargaining agreement is involved. This *post hoc* development doesn't make the policy any better. As this case shows, "application" means to the Commissioner *any* reference to the collective bargaining agreement, even if it is for no other purpose than to find out the employee's wage rate. Because virtually every collective bargaining agreement includes employees' wage rates, this means that whenever a penalty under Cal.Lab.Code §203 is sought by an employee covered by a collective bargaining agreement with an arbitration clause, the Commissioner will reject the claim. In the end, therefore, the old and new formulations of the Commissioner's policy amount to the same thing. Furthermore, because 99% of collective bargaining agreements contain arbitration clauses, the policy boils down to whether the employees are covered by a collective bargaining agreement. This suggests the answer for why the Commissioner's intake form simply asks the employee whether she is "Union."

In the Commissioner's letter to Livadas rejecting her claim, the only reason given was that to calculate the penalty due her would require looking into the collective bargaining agreement to find her rate of pay. J.A. 16-17. It is obvious

that such a reference does not require the type of consideration of the terms of the collective bargaining agreement that would lead to Section 301 preemption under *Allis-Chalmers* v. *Lueck*, 471 U.S. 202 (1985) and *Lingle* v. *Norge Div. of Magic Chef*, 486 U.S. 399, 411 (1988). Faced with this, the Commissioner now struggles to suggest that some greater review of the collective bargaining agreement was necessary. His efforts fall far short of his goal. There was never any dispute about the amount Livadas was owed upon her termination. There was never any reason to evaluate whether Safeway correctly calculated the amount she was owed, because she never protested how much she was paid, but only when it was paid. The Commissioner also suggests that a more detailed review of the collective bargaining agreement is necessary to ascertain what was Livadas' "same rate of pay," since she was a part-time employee. The term "same rate," however, is not defined or used in the collective bargaining agreement; it is in Cal.Lab.Code §203. An employee's "same rate" is a matter of state law, and surely the Commissioner has dealt with the question how to determine this for part-time employees. All the information the Commissioner needed—wage rate and hours worked—was available in the payroll records Safeway was required to keep. No reference to the collective bargaining agreement was needed or appropriate.

B. The Commissioner Would Substitute The Lowest-Level Equal Protection Analysis For The Court's Traditional Approach To Labor Law Preemption

The Commissioner has dropped his contention made below, that individual employees have no rights under the NLRA. Instead, he makes a new argument that a state may deny benefits to its citizens because they exercise federal rights, as long as there is a "rational basis" for doing so. Commissioner's Brief at 17-28. *See* Brief for Food Employers Council, Inc. at 10. He cites decisions in cases arising under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Livadas has never asserted any claims under

the Equal Protection Clause, however. The source of her rights is not the Equal Protection Clause, but is the NLRA. The Court has never employed a "rational basis" test to allow the States to regulate conduct protected or prohibited by the NLRA. To do so now, as the Commissioner invites, would be to wipe out all existing federal labor law preemption precedent. For instance, if *Golden State* had been analyzed using a "rational basis" test, no deprivation of the employer's immunity from governmental interference in its labor dispute would have been found. The City of Los Angeles could have plausibly argued that its local concerns in ending a disruptive transportation strike and preserving public safety were rational grounds for its denial of the company's franchise application under local law. These were specifically the concerns of Wisconsin and Missouri in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951) and *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963), where the Court held that they did not justify governmental intervention in a strike.

The Commissioner cites a passage from *Lingle* where the Court stated that a state law covering only unionized workers would not be preempted *by §301* if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder. *Lingle*, 486 U.S. at 408, fn. 7, cited at Commissioner's Brief, p. 30. The Court was not called upon, and did not, consider whether a state law that withheld benefits from unionized employees would pass muster under *Brown* v. *Hotel Employees*, 468 U.S. 491, 500-503 (1984); *Machinists* v. *Wisconsin Employment Relations Commission, supra*, or *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243-244 (1959). When the question of the applicability of §1983 to the deprivation of NLRA rights was taken up by the Court two years later in *Golden State II*, the Court made it plain that differential treatment of citizens by state or local government based upon the exercise of federal rights is not permitted even if the state asserts a "rational basis" for it.

C. The Commissioner Cannot Justify His Policy By Claiming It Encourages Arbitration Under Collective Bargaining Agreements

The Commissioner argues that his policy is justified because it is part of California's strong policy in favor of arbitration. In fact, however, the State has a policy against arbitration of Labor Code claims, which is stronger than its policy in favor of arbitration in other contexts. *See Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 131-133 (1973). Accordingly, Cal.Lab.Code §229 commands that arbitration provisions be disregarded, except in the case of collective bargaining agreements.

Nevertheless, even though the sentence about collective bargaining agreements is nothing more than an exception to a general anti-arbitration rule, the Commissioner insists that this represents a strong public policy in California that the Court ought to respect. The policy, according to the Commissioner, is to favor arbitration under collective bargaining agreements. It ought to be respected in this case, he says, because it is consistent with federal labor policy favoring arbitration.

The Commissioner does not address the fact that federal law alone governs in this area. *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). In developing the exclusive federal law of labor arbitration under §301, the Court has observed the congressional direction in LMRA §203(d) to fashion rules greatly favoring the arbitration process. In fact, these rules about arbitration comprise most of the law under §301. But the States have no role in this, except to follow the exclusive federal law as developed by the federal courts. It does not matter that state law seeks the same objectives as federal law. *See Wisconsin Department of Industry* v. *Gould, Inc.*, 475 U.S. 282, 288-289 (1986). It can hardly be said, however, that the Commissioner's policy supplements federal labor policy in any positive way. As a price for choosing to bargain collectively for arbitration, employees lose the protection of the California Labor Code. Penalizing this choice can hardly be said to encourage it.

D. To Defeat Livadas' §1983 Claim, The Commissioner Urges That The NLRA Does Not Confer "Specific" And "Definable" Rights, A Position Rejected By The Court In *Golden State II*.

The Commissioner does not argue now as he has before (Supplemental Brief by Respondent at 6, fn. 3) that his agency's rejection of Livadas' claim was an adjudication. The implicit concession that the summary dismissal of Livadas' claim was not an adjudication is fatal to his attempt to avoid §1983 relief. Where a state actor has interfered with the exercise of federal rights in a non-judicial capacity, there is no reason for the federal courts to abstain from issuing injunctive and declaratory relief. *See New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 369-70 (1989).

Instead, the Commissioner makes an entirely new argument that §1983 gives no remedy here because Livadas' rights under the NLRA are not "specific and definable." Commissioner's Brief at 45-49. This line of reasoning is foreclosed by the Court's decision in *Golden State II*. There, the Court ruled that freedom from state regulation under the *Machinists* preemption doctrine was sufficiently "specific and definite" for §1983 purposes. 493 U.S. at 110-112. In the present case, Livadas' rights under the NLRA are spelled out in the statute, and specifically secure to her the right to select a collective bargaining representative, bargain for a contract through the representative, and to include an arbitration clause in the bargain. Her rights are much more specific and definable than those of the employer in *Golden State II*.

Despite this, the Commissioner believes he cannot be reached under §1983 unless the statute contains a clear directive *to him*. He cites cases[1] where the issue was the definite-

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[1] *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1 (1981); *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987) and *Wilder* v. *Virginia Hospital Association*, 496 U.S. 512 (1990).

ness of instructions given by federal law to state and local officials. *Golden State II*, however, did not involve any statutory directions to state and local officials. The City of Los Angeles in that case made the same argument the Commissioner does here, and it was rejected.

> The city's contrary argument, that the NLRA does not secure rights against the State because the duties of the State are not expressly set forth in the text of the statute, is not persuasive. . . . The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute.

Id., 493 U.S. at 111-112.

The Commissioner further complains about this Court's own decisions on §301 preemption, calling them a "tangled web." He asserts that no §1983 action should lie when the principles the Court laid down in those cases are violated. Commissioner's Brief at 48-49. It is not entirely clear to the Petitioner what point the Commissioner is trying to make, since her theory of this case is not that the Commissioner's refusal of her claim violated §301 preemption principles, but rather that those principles did not justify the refusal.[2] Her claim is based squarely on the Commissioner's systematic discrimination against those who have exercised their NLRA §7 rights, not on any provisions of her collective bargaining agreement.

Livadas' rights under the NLRA are specific and explicit. This Court's decision in *Lingle* dispels any doubt that Livadas' Cal.Lab.Code §203 claim is not preempted—so completely, indeed, that no one now attempts any argument to the contrary. There is no "thin line" here between principles

[2] The Commissioner's justification at earlier stages in this case has rested on the belief that Livadas' claim was preempted by §301. *See* Defendant's [Appellant's] Opening Brief, in the Court of Appeals, at 3, 34; J.A. 34-35.

of labor law preemption. The Commissioner is not entitled to any sympathy for his reluctance to proceed, for the avenue is broad and open.

III. UNLIKE *FT. HALIFAX*, THE COMMISSIONER'S POLICY DEPRIVES EMPLOYEES OF LABOR CODE PROTECTIONS REGARDLESS OF WHAT HAPPENS IN COLLECTIVE BARGAINING; THERE IS NO BASIS IN THIS CASE FOR CONSIDERING WHETHER THERE WAS A WAIVER OF SUCH PROTECTIONS

The statute in *Fort Halifax* provided for severance pay in the event of a plant closure, but stated that its terms would not apply to an employee who was covered by an express contract providing for severance pay. 482 U.S. at 4, fn. 1. The Court held that the statute was not preempted by virtue of the power of employees to *agree* to a different arrangement, including through the vehicle of collective bargaining. *Id.* at 22. This type of statutory provision is quite common. All of the statutes described in Parts I, IV and V of Addendum B to the Employers Group brief are like this: the provisions of the statute apply unless the parties have *agreed* to something different in a collective bargaining agreement. Every statute except Or.Rev.Stat. §279.334 in Part II of the addendum, and all of the statutes except the Nevada and Oregon statutes in Part III of the addendum, are from this mold.

Cal.Lab.Code §229 is different. As interpreted by the Commissioner, it deprives employees of many of the protections of the Labor Code regardless of whether they have agreed in collective bargaining to a substitute arrangement.[3] The Commissioner has already exercised this option, for all employees covered by collective bargaining agreements and for all time.

[3] The Commissioner confuses the issue by identifying the minimum labor standard at issue as Cal.Lab.Code §229. The minimum labor standard at issue is the statutory requirement of immediate wage payment on discharge and daily penalties for any delay, enacted by Cal.Lab.Code §§201 and 203. Cal.Lab.Code §229 *withdraws* the State's mimimum labor standards from those with collective bargaining agreements.

There is no decision to be made in collective bargaining whether to keep or trade Labor Code rights; this has been foreclosed by the Commissioner's policy. It is therefore clear that (1) Section 229 cannot be compared to the statute in *Fort Halifax*, as the Commissioner attempts to do, and (2) the decision Livadas seeks in this case will not have the far-reaching effect on other state statutes claimed by the Employers Group.

The Commissioner argues that there is a option in this statute as there was in *Fort Halifax*, because any workers covered by a collective bargaining agreement could have the benefits of the Labor Code by electing not to have any arbitration under their agreement. Commissioner's Brief, p. 33.[4] However, in a somewhat obscure passage (Commissioner's Brief, p. 33, last paragraph), the Commissioner seems to suggest that the choice here is not simply Labor Code protection and no arbitration, on the one hand, and arbitration but no Labor Code, on the other. The other route ("the bay"), he suggests, is for employees to negotiate "their own standards and remedies within the collective bargaining agreement." This is, of course, the same as the "arbitration, no Labor Code" choice: *of course*, if the Labor Code protections are denied them, employees can try to negotiate some of these back. But they must consume limited bargaining resources to win back a right all other employees enjoy as a matter of law. This practice imposes an unjustified surcharge on workers' exercise of their NLRA rights.

[4] Contrary to the Commissioner, the AFL-CIO has not taken a position here different from what it urged in *Fort Halifax*. As the portion of its brief quoted by the Commissioner shows (Commissioner's Brief, p. 32), the AFL-CIO took the position in *Fort Halifax* that the ability provided under the Maine statute for employees to *contract* out of the statutory severance pay arrangement enhanced collective bargaining. Section 229 has the opposite effect, because it denies workers the benefit of the Labor Code regardless of what happens in collective bargaining.

The *amici* in support of the Commissioner take up this last point, and argue explicitly that merely choosing to have a collective bargaining agreement amounts to waiver of state-law protections. Employers Group Brief, pp. 17, 23-25; Chamber Brief, pp. 13-14. They are forced to this extreme position because there is nothing in this case to suggest an intentional waiver of Cal.Labor Code §§201 and 203, let alone contracting out of those standards. There is not a word in Livadas' agreement on the subject of when terminated employees are to be paid their accrued wages. There is no evidence that this subject was ever even discussed in negotiations. California law forbids waiver of these rights.[5] In *Lingle*, the Court reserved the question whether a union may waive its members' individual, non-preempted state-law rights. 486 U.S. at 409, fn. 9. Despite the urging of *amici*, this question is not ripe for decision here, either, given the absence of anything to suggest a waiver. The Court has explained that if it ever takes up this very difficult question, it will only be on a record showing "clear and unmistakable" evidence, under *Metropolitan Edison* v. *NLRB*, 460 U.S. 693, 708 (1983), that a waiver was intended.

Moreover, the Court has already rejected *amici*'s contention that a forfeiture of state-law rights occurs just because collective bargaining exists.

> It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations. *Ibid.* (quoting *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 228 (1970) (concurring opinion)). Absent a collective-bargaining agreement, for instance, state common law generally permits an employer to run

[5] Cal.Lab.Code §219 provides in relevant part: ". . . [N]o provision of this article [Cal.Lab.Code §§200-243] can be contravened or set aside by a private agreement, whether written, oral, or implied."

> the workplace as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on preexisting state law to justify its authority to make employment decisions; that same state law defines the right and duties of employees. Similarly, Maine provides that employer and employees may negotiate with the intention of establishing severance pay terms. If impasse is reached, however, preexisting state law determines the right of employees to a certain level of severance pay and the duty of the employer to provide it. Thus, the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for 'there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining.' *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504-505 (1978).

Fort Halifax, 482 U.S. at 21-22.

The Chamber of Commerce essentially asks the Court to overrule *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax*. It complains (Chamber Brief, pp. 22-24) that States should not be allowed to impose substantive employment terms where there is a NLRA collective bargaining relationship. It is asserted that this will improperly narrow the "corridor" available for collective bargaining. This is precisely what the Court held in *Metropolitan Life* and *Fort Halifax* that the States have the power to do. It was pointed out that the States have long had and exercised this power, before the NLRA was enacted, and that Congress had no intent to displace or supplant the States in this regard.[6]

[6] The Chamber cites *H.K. Porter* v. *NLRB*, 397 U.S. 99 (1970) in support of the proposition that States should be denied this power. The decision in that case, however, involved only the question whether the NLRA allows the NLRB to mandate the substantive terms of collective bargaining agreements, and held that it does not, because the NLRA only provides the process for collective bargaining, not its content. The Court in *H.K. Porter* said nothing about the power of states to substantively regulate the employment relationship. This procedural/substantive distinction between the NLRA and state law was explicitly recognized by the Court in *Metropolitan Life*, 471 U.S. at 753-755.

IV. A STATE IS NOT LIKE A PRIVATE ACTOR UNDER THE NLRA, AND ITS ACTIONS CANNOT BE JUSTIFIED BY REFERENCE TO WHAT AN EMPLOYER OR UNION COULD DO

The Employers Group, *amicus curiae*, submits that if a private employer could legally do what the State did, then there is no preemption and no deprivation of federal rights. Other than a sentence out of context from *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967)[7], nothing is cited in support of this proposition, for the Court has never intimated that this would be an acceptable mode of analysis. If adopted, it would produce bizarre results. *Golden State* could not have been decided as it was, because a private employer is free under NLRB precedent to decline to do business with another company with labor problems such as an

[7] The Court in *Nash* said, "We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States." *Id.*, 389 U.S. at 239. This was not the Court's *ratio decidendi*. The Court decided, "Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan (footnote omitted)," citing *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) and other cases holding that under the Supremacy Clause, the States may not burden the operation of federal laws. The question in any preemption case is whether the state law has such an effect, not whether a private person might lawfully take the same action. The Employers Group has attempted to pull this entire case through a pin hole. It has seized on a single sentence from *Nash* and has tried to make out of it an entirely new theory of preemption and §1983 analysis.

impending strike. *See NLRB* v. *Servette, Inc.*, 377 U.S. 46, 49-54 (1964). The standards at issue in *Metropolitan Life* were set unilaterally by Massachusetts, which would have been unlawful for an employer or a union to do under the NLRA. *See NLRB* v. *Katz*, 369 U.S. 736, 744 (1962). *Wisconsin* v. *Gould* would have been decided in favor of Wisconsin's debarment law, because a private employer may decline to deal with another company with a record of violating federal labor laws. Indeed, in that case the Court addressed and soundly rejected the idea of equivalency under the NLRA between private actors and the States:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. [cit. om.] The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. [cit. om.] The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.
>
> 475 U.S. at 290.

Using its "private actor" test, the Employers Group reasons that because employers under the NLRA may provide different terms and conditions of employment to unrepresented workers than it agrees to for a unit of unionized workers, a State could do the same thing, as California has done here. If this notion became law, a State could legislate higher minimum wages for union-represented employees than for those without representation. It could require that the employment of unrepresented workers be "at will," while just cause was required to terminate anyone represented by a

union. Such laws would replicate differential conditions presently existing in private employment.

In any event, the NLRB has *not* consistently held that an employer may give different terms and conditions of employment to units of represented and unrepresented employees. In its most recent case on the subject, the Labor Board stated:

> We agree with the General Counsel's and the Union's contentions that the Respondent unlawfully excluded bargaining unit employees from participating in its severance plan. In *Niagara Wires*, 240 NLRB 1326 (1979), the Board found that the maintenance of an employee benefit plan that restricted coverage to unrepresented employees violated Section 8(a)(1) because it conveyed to employees the impression that they would lose the benefit if they ever chose union representation. The severance plan provided for in the Respondent's policies and procedures manual clearly conveys that impression. There is no evidence in the record to suggest that severance benefits were ever discussed in negotiations with the Union, or that the Respondent considered them a subject for bargaining. Nor does the record indicate that the severance benefits set forth in the Respondent's manual codified a historical practice of excluding unit employees.[16] Thus, there is nothing in the record that might dispel the message that the loss of severance benefits was the necessary result of choosing union representation. [footnote omitted].
>
> [16] In this regard, we find this case factually distinguishable from our decisions in *KEZI, Inc.*, 300 NLRB 594 (1990); *Fabric Warehouse*, 294 NLRB 189-92 (1989); *Lynn-Edwards Corp.*, 290 NLRB 202 (1988); *A. H. Belo Corp.*, 285 NLRB 807, 808-809 (1987); and *Handleman Co.*, 283 NLRB 451, 452 (1987).

A.M.F. Bowling Co., 303 NLRB 167, 170-171 (1991). It seems that under the Labor Board's current view, the test proposed by the Employers Group would mean that Livadas prevails. Unlike the prior cases distinguished by the Labor Board in *A.M.F. Bowling*, the distinction in Cal.Lab.Code §229 is not

a codification of historical practice. For more than 40 years before the enactment of §229 in 1959, the requirements of immediate payment upon termination, providing penalties for violation of this requirement, and mandating the Labor Commissioner to enforce employees' claims had applied to all California employees without distinction. *See* Petitioner's Brief, p. 22, fn. 11. Nevertheless, despite the advantage Livadas might gain from the Employer's Group theory in the present case, it would lead to such turmoil that the Court should not consider it.

V. THE CASE IS NOT MOOT

The Chamber of Commerce suggests that the case is moot because an arbitrator reinstated Livadas to her job with partial back pay (Chamber Brief, p. 17, fn. 9). This is based on the Labor Commissioner's suggestion that the employer would have a defense to penalty wages based on the employee's ultimate reinstatement with full back pay (Respondent's Brief, p. 4). The Commissioner does not cite any authority or offer any reasoning in support of this suggestion. It is not California law. Under Cal.Lab.Code §203, an employer's subsequent settlement does not extinguish a penalty claim for late payment of wages that were concededly due at the time of discharge. *See Sullivan* v. *Del Conte Masonry Co.*, 238 Cal.App.2d 630, 633-34, 48 Cal.Rptr. 160, 163 (Cal.Ct.App. 1965); *Triad Data Services, Inc.* v. *Jackson*, 153 Cal.App.3d Supp. 1, 11, 200 Cal.Rptr. 418, 424 (Cal.App.Div. 1984). The wages due Livadas upon her termination were those she earned before she was fired, not after. The back pay she got in the arbitration over her termination covered the period *after* she was fired. The purpose of the requirement of payment upon termination, and the penalties to enforce this, is to immediately give the worker facing unemployment all of his or her accrued wages. The worker who is reinstated months later (in Livadas' case, six months) is just in much of need of income at the time of termination as one who is never reinstated.

Furthermore, as the arbitration award shows, the issue was whether or not Livadas was terminated for just cause, not whether she was paid her accrued wages immediately upon her termination. The latter is not even mentioned in the arbitration award, because it was not part of the case. Nothing in the collective bargaining agreement authorizes a penalty for late payment of accrued wages to a terminated employee, and this arbitration award accordingly gave no such penalties. The statutory claim and the contractual grievance have always been, and still are, completely separate.[8]

VI. CONCLUSION

The Court should reverse the decision of the Court of Appeals and hold (1) that Livadas' claim for late-payment penalties was not preempted by federal law, (2) that the Commissioner's policy not to pursue employees' unpreempted state-law minimum standards claims solely because they are covered by collective bargaining agreements with arbitration clauses burdens employees' NLRA §7 rights and is therefore preempted, and (3) that Livadas is entitled under §1983 to injunctive relief from the Commissioner's policy.

Respectfully submitted,

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April 15, 1994

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[8] Finally, even if Livadas' 1990 claim for penalties were no longer viable under California law, this case would not be moot. Livadas is attacking an explicit state-wide policy that adversely affects both Livadas and all other fellow union members. The Commissioner's exclusion policy is "fixed and definite," is therefore likely to recur, and "is a factor lurking in the background of every incipient labor contract" in California. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974). The Commissioner's ongoing policy continues to affect the calculus of collective bargaining, and so this case is not moot. *Cf. id.*

Supreme Court U.S.
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No. 92-1920

In the Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS, PETITIONER

v.

LLOYD AUBRY,
CALIFORNIA LABOR COMMISSIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner may sue the California Labor Commissioner for injunctive relief and damages under 42 U.S.C. 1983, for refusing to prosecute her state wage-and-hour claim on the basis of her status as an employee covered by a collective bargaining agreement containing an arbitration clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1920

KAREN LIVADAS, PETITIONER

v.

LLOYD AUBRY,
CALIFORNIA LABOR COMMISSIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The court of appeals in this case (Pet. App. 7a) acknowledged that the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, gives petitioner "a right to engage in collective bargaining, and [42 U.S.C.] 1983 therefore provides a remedy for a deprivation of that right." The court held, however, that respondent did not impermissibly interfere with petitioner's exercise of her rights under the NLRA by refusing to prosecute her wage claim under the California Labor Code on the basis of her status as an employee covered by a collective bargaining agreement containing an arbitration clause. Respondent's action was based on the legal conclusion that petition-

er's claim was preempted under Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185.

The court of appeals' decision misapplies the doctrine of federal labor law preemption under Section 301 of the LMRA, as articulated in decisions of this Court. It is also inconsistent with decisions of the Court holding that state action that impairs rights protected by the NLRA is preempted by direct operation of the Supremacy Clause. The United States, and the National Labor Relations Board in particular, have an important interest in ensuring that States do not discriminate against employees who exercise their rights under the NLRA, and that States enforce their laws in a manner consistent wtih NLRA and Section 301 preemption principles. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

STATEMENT

1. On January 2, 1990, petitioner, a union-represented employee covered by a collective bargaining agreement, was discharged from her position as a clerk at a Safeway store in Napa County, California.[1] On that date, she requested payment of all wages due her. The store manager refused, telling petitioner that he would mail her a check instead. Petitioner received that check three days later, on January 5. Pet. App. 2a.

Petitioner believed that Safeway's three-day delay in payment violated California law. Section 201 of the California Labor Code provides: "If an employer

[1] Petitioner was represented by Local 373, United Food and Commercial Workers, AFL-CIO. Pet. App. 24a.

discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Cal. Lab. Code § 201 (West 1989). Section 203 provides: "If an employer willfully fails to pay * * * in accordance with Section[] 201 * * * any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid." Cal. Lab. Code § 203 (West 1989). On January 9, petitioner filed a claim with the California Division of Labor Standards Enforcement (DLSE) seeking a penalty payment from Safeway pursuant to Section 203. Pet. App. 2a-3a.

Respondent is the California Labor Commissioner and head of DLSE. He is authorized by Section 98.3(a) of the California Labor Code to prosecute actions to collect penalties on behalf of individuals who are "financially unable to employ counsel and * * * have claims which are valid and enforceable" under the California Labor Code. Cal. Lab. Code § 98.3(a) (West 1989). Pet. App. 3a. On February 7, 1990, DLSE sent petitioner a letter declining to prosecute her claim. *Ibid.* The letter stated (*id.* at 8a):

> It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause. [2]

[2] Cal. Lab. Code § 229 (West 1989) states (Pet. 3):

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of

> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

2. a. On February 16, 1990, petitioner filed an action in federal district court against respondent in his official capacity as Labor Commissioner under 42 U.S.C. 1983, seeking injunctive and declaratory relief and damages based on respondent's refusal to prosecute petitioner's claim against Safeway for the penalty prescribed by Section 203 of the California Labor Code. Pet. App. 3a. As described by the district court (*id.* at 24a-25a), the complaint alleged that DLSE maintains "[an] agency policy of discrimination in the enforcement of the California Wage and Hour Law against employees who work under collective bargaining agreements which have arbitration clauses." That policy, petitioner alleged, "denied her access to the investigatory, prosecutorial, and remedial resources provided under [the] California Labor Code * * * for the sole reason that she is an employee" covered by such an agreement. *Id.* at 25a. DLSE's policy entitles her to relief under Section 1983, petitioner urged, since it denies her benefits merely because she has engaged in federally protected rights to "participat[e] in a labor union and in collective bargaining." *Ibid.*

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any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

Respondent admitted in the district court that DLSE's policy "is to enforce Labor Code [Sections] 201 and 203 for all employees except for those whose work is governed by [collective bargaining agreements] containing binding arbitration clauses." Pet. App. 25a. He defended DLSE's policy on the ground that it is required by federal labor law preemption doctrine. Respondent explained that "[s]ince damages under [Section] 203 are determined in terms of wages, which are established by the [collective bargaining agreement], * * * enforcement of the statute would entail interpretation of the [agreement]." *Id.* at 26a.

b. The district court granted summary judgment for petitioner. Pet. App. 49a. Relying on this Court's decision in *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), the district court stated that a state or local governmental policy that burdens or penalizes employees' exercise of rights granted by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, is preempted by the NLRA. Moreover, under *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*), an employee so affected by such a policy may obtain injunctive relief and damages from the governmental unit under Section 1983. Pet. App. 27a-32a. The district court concluded that the NLRA affords petitioner the right to negotiate, through her union, a collective bargaining agreement containing an arbitration clause, and that DLSE's policy of granting benefits provided by state law to all employees except those who work under such a labor contract infringes upon that federal right. *Id.* at 32a-38a.

Finally, the district court rejected respondent's defense (reflected in DLSE's February 7 letter to petitioner) that DLSE was "preempted" from prosecuting petitioner's claim by Section 229 of the California Labor Code, as interpreted by the California courts.[3] The district court held that preemption doctrine is a matter of federal, not state, law and that, insofar as Section 229 is interpreted as going beyond the requirements of federal preemption doctrine, it is invalid. Pet. App. 39a-44a, 48a. Relying on *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), and *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the district court concluded that petitioner's state-law claim for a penalty payment from Safeway was not preempted by Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185. The question whether Safeway violated state law, the district court found, "can be determined wholly independently from the [collective bargaining agreement]. * * * It requires reference only to a calendar, not to the [agreement], to determine that the statute was violated and penalties are due." Pet. App. 41a.

Accordingly, the district court, *inter alia*, issued an injunction requiring respondent to enforce Sections 201 and 203 "without discrimination based upon a given claimant's coverage under a collective-

[3] In *Plumbing, Heating & Piping Employers Council* v. *Howard*, 126 Cal. Rptr. 406 (Cal. Ct. App. 1975), discussed in note 6, *infra*, the state appellate court addressed the question whether Section 229 "precludes the Labor Commissioner from hearing and enforcing a claim for collection of alleged due and unpaid wages by an employee who belongs to a union which has entered into a collective bargaining agreement which contains an arbitration clause." 126 Cal. Rptr. at 409.

bargaining agreement having an arbitration clause." Pet. App. 49a. It ordered respondent to institute an action on petitioner's behalf in the California courts under Section 203, and to pay her the full value of her wage claim in the event that the state courts found her claim time-barred. *Ibid.*

3. A divided panel of the Ninth Circuit reversed. The panel majority agreed with the district court that petitioner has a right under the NLRA to engage in collective bargaining and that she has a cause of action under Section 1983 to obtain a remedy if the State interferes with that right. Pet. App. 7a. The majority held, however, that DLSE's policy does not "implicate[] [petitioner's] federal rights at all." *Id.* at 10a. The court understood Section 229, as interpreted by the state courts, "to preclude the adjudication of claims that would be preempted by federal labor law." *Id.* at 9a. For respondent to so limit his enforcement of Section 203 claims, the court concluded, "is perfectly permissible under federal law." *Id.* at 11a. The court further stated that, even if respondent were mistaken in deciding that petitioner's claim is preempted by federal law (an issue which the majority did not reach), he did not thereby deprive her of rights under the NLRA. That is because respondent's refusal to prosecute petitioner's claim amounted, at most, to a misapplication of Section 229, and "[a] misinterpretation of a perfectly valid state statute * * * does not provide grounds for federal relief." *Id.* at 12a. Rather, the appropriate avenue of relief in these circumstances, the court stated, is for petitioner to seek a writ of mandate against respondent in the California courts. *Ibid.*

The court of appeals concluded that "[t]o hold that [petitioner] is entitled to federal relief in this case would require us to hold that she is entitled under the NLRA to a correct interpretation of California law regarding enforcement of [Section] 203 claims." Pet. App. 12a. The court stated that Congress did not intend the NLRA to confer any such entitlement upon unionized employees. The court reasoned that such an entitlement would "place employees who bargain collectively in a better position than those who do not because it gives them an extra avenue of redress for the erroneous determination of state law." *Id.* at 13a. Congress could not have intended that result, said the court, "[b]ecause [Section] 7 of the NLRA gives employees the right to *refrain* from bargaining collectively as well as the right to do so." *Ibid.*

In addition, the panel majority was "persuaded by the more general policies of federal labor law" that "Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted." Pet. App. 13a-14a. "If anything," the court reasoned, "Congress would presumably want state officials to defer to arbitration * * * if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." *Id.* at 14a.

Judge Kozinski dissented. He noted that respondent's refusal to process petitioner's claim because she was covered by a collective bargaining agreement "is clearly discrimination based on an exercise of protected federal rights." Pet. App. 17a. In his view, it does not matter that respondent's policy was based on his interpretation of state law: "[t]he point is,

[respondent] is applying state law and his own policy in a way that impinges on protected federal rights." *Ibid.* Therefore, and contrary to the panel majority's view, it was necessary for the court to determine whether Section 301 of the LMRA, 29 U.S.C. 185, actually preempts resolution of petitioner's claim by the state agency, not whether the state policy was reasonably intended to avoid the preemptive force of Section 301. *Id.* at 17a-18a.

Judge Kozinski then concluded, in agreement with the district judge, that, under *Lingle*, petitioner's claim is not preempted by Section 301. "A court could find that [Safeway] did not pay [petitioner] immediately upon termination—and thus violated the statute—without ever looking at the [collective bargaining agreement]." Pet. App. 19a. The dissent also found that respondent's refusal to enforce wage-and-hour claims under these circumstances impermissibly burdens the NLRA rights of employees in petitioner's position in two ways. First, it denies only employees "who exercise their federal labor rights" the benefits of respondent's pursuit of their state labor law claims free of charge. *Id.* at 20a. Second, it impedes unionization efforts by giving employers a plausible basis for telling employees during election campaigns that if they "vote for the union," then "the state Labor Commissioner [will] abandon[] you." *Id.* at 21a & n.2.

SUMMARY OF ARGUMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees the right to bargain collectively, and Section 8(a)(1), 29 U.S.C. 158(a)(1), protects employees from coercion in the exercise of that right. This Court has held that state action that impairs rights guaranteed by the NLRA—including the right to bargain collectively—is barred by direct operation of the Supremacy Clause. See *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 109 (1989) (*Golden State II*); *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967); see also *Brown* v. *Hotel Employees*, 468 U.S. 491, 503 (1984); *Hill* v. *Florida*, 325 U.S. 538 (1945). In *Golden State II*, *supra*, this Court further held that 42 U.S.C. 1983 provides employees with a remedy for the State's deprivation of federal rights guaranteed under the NLRA.

In accordance with these principles, petitioner in this case has a valid claim for relief under Section 1983, arising from respondent's refusal to enforce her state wage-and-hour claim. In applying Section 229 of the California Labor Code, respondent has adopted a general policy of not enforcing certain wage-and-hour claims of employees covered by collective bargaining agreements containing an arbitration clause, while at the same time enforcing similar claims of employees who are not covered by such agreements. See Pet. App. 25a. Because the policy goes beyond the requirements of federal labor law preemption, and effectively interferes with employees' rights to bargain collectively, it gives rise to a cause of action under Section 1983 for the impairment of rights guaranteed by the NLRA.

2. Section 229 of the California Labor Code states that respondent may not enforce claims involving "any dispute concerning the interpretation or application" of any collective bargaining agreement containing an arbitration clause. See Pet. 3. Contrary to respondent's submission, see Pet. App. 8a, enforcing state wage claims such as petitioner's would not require respondent to interpret Section 229 of the California Labor Code in a manner that is inconsistent with principles of preemption under Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185. Petitioner's claim is not preempted by Section 301 because the disposition of her claim turns on whether petitioner received her final wage payment on time—an issue that can be resolved without referring to any term of the collective bargaining agreement covering petitioner. See *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220 (1985); *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-410 (1986). Moreover, as this Court made clear in *Lingle*, 486 U.S. at 413 n.12, the fact that it might be necessary to refer to the collective bargaining agreement to determine the amount of wages due petitioner as a remedy for her employer's violation of the state wage-and-hour laws would not require preemption of her state-law claim.

3. In refusing to enforce late-payment claims such as petitioner's, where that policy is not required by federal law, respondent in effect treats a category of employees covered by collective bargaining agreements with arbitration clauses less favorably than other employees. That practice impermissibly burdens the exercise of Section 7 rights by systematically depriving employees who exercise those rights

of the benefit, which other employees enjoy, of having respondent press their state-law wage claims free of charge. The fact that the discriminatory policy might be characterized as arising from a good faith "error" in applying a state statute that purports to coincide with the scope of federal preemption does not affect the analysis. Whatever the motive for the policy, its effect is to impair employees' federal rights by selectively treating some categories of workers covered by collective agreements less favorably than employees not so covered. Moreover, the fact that respondent's refusal to enforce petitioner's claim might stem from an incorrect application or interpretation of a state statute does not foreclose relief under 42 U.S.C. 1983. See *Nash* v. *Florida Industrial Comm'n*, *supra*; *Golden State II*, *supra*. Regardless of whether petitioner might be able to obtain enforcement of her state-law claim by seeking a writ of mandate in California state court, she is entitled to sue directly for relief in federal court for the impairment of her Section 7 rights. As this Court held in *McNeese* v. *Board of Educ.*, 373 U.S. 668, 671 (1963), the availability of a remedy under Section 1983 for a violation of federal rights "may not be defeated because relief was not first sought under state law which provided a remedy."

ARGUMENT

PETITIONER IS ENTITLED TO RELIEF UNDER 42 U.S.C. 1983 FOR RESPONDENT'S INTERFERENCE WITH HER RIGHT TO BARGAIN COLLECTIVELY UNDER SECTION 7 OF THE NLRA BY REFUSING TO ENFORCE HER STATE WAGE CLAIM

Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees the right to bargain collectively, and Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to coerce employees in the exercise of that right. This Court has recognized, however, that the NLRA confers rights "generally on employees and not merely as against the employer." *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 109 (1989) (*Golden State II*) (NLRA "creates rights in labor and management both against one another and against the State."). Therefore, state action that impairs rights guaranteed under the NLRA—including the right to bargain collectively—is barred by direct operation of the Supremacy Clause. See *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967); see also *Brown* v. *Hotel Employees*, 468 U.S. 491, 503 (1984); *Hill* v. *Florida*, 325 U.S. 538 (1945). For example, in *Nash*, the Florida Industrial Commission interpreted a state law that barred individuals unemployed due to a labor dispute from receiving unemployment benefits as applying to any individual who filed an unfair labor practice charge with the National Labor Relations Board. The Court found that the manner in which the State applied the "labor dispute" disqualification imposed a "financial burden" that, "like the coercive actions which employers and unions are forbidden to

engage in," had a "direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." 389 U.S. at 239. It therefore concluded that the Florida law, as applied, violated the Supremacy Clause because the State could not "defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Ibid.*

The Court further held, in *Golden State II*, that 42 U.S.C. 1983 provides employees with a remedy for the State's deprivation of federal rights guaranteed under the NLRA. If a state statute or policy interferes with conduct that is protected by the NLRA, then "pre-emption follows . . . as a matter of substantive right," 493 U.S. at 110 (quoting *Brown* v. *Hotel Employees*, 468 U.S. at 503), and any affected employee may obtain relief under Section 1983 for interference with his federal statutory rights. *Golden State II*, 493 U.S. at 109 (NLRA gives employees "rights enforceable against governmental interference in an action under [Section] 1983").

It follows, in our view, that petitioner has a valid claim for relief under Section 1983, arising from respondent's refusal to enforce her wage-and-hour claim. In applying Section 229 of the California Labor Code, respondent has adopted a general policy of not enforcing certain wage-and-hour claims of employees covered by collective bargaining agreements containing an arbitration clause, while at the same time enforcing similar claims of employees that are not covered by such agreements. See Pet. App. 25a. As explained more fully below, that categorical policy is not required by principles of federal labor law preemption under Section 301 of the Labor-

Management Relations Act (LMRA), 29 U.S.C. 185. Because the policy goes beyond what preemption requires, and systematically operates to the detriment of employees covered by collective bargaining agreements (in comparison with other employees), it effectively interferes with employees' rights to bargain collectively under the NLRA. It therefore is barred by the Supremacy Clause, and gives rise to a cause of action under Section 1983 for the impairment of rights guaranteed by the NLRA.[4]

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[4] Petitioner asserts (Pet. 7-8, 11) that the governmental action in this case, as in *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), implicates *Machinists* preemption. See also Pet. App. 37a-38a (district court opinion). *Machinists* preemption precludes States from regulating in areas that Congress intended to be "free from all regulations, whether state or federal." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 113 S. Ct. 1190, 1195 (1993); see also *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 749-751 (1985); *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). However, the state action in this case is barred not because it intrudes into an area that Congress intended to leave unregulated, but because "of an actual conflict with [Section] 7." *Brown* v. *Hotel Employees*, 468 U.S. at 501.

In any event, it is immaterial to our analysis whether the state action here is preempted because of an actual conflict with Section 7 or based on principles of preemption articulated in the *Machinists* case. In *Golden State II*, the Court explained that a Section 1983 suit could be predicated, as here, on state interference with rights "explicitly set forth in [Section] 7," or, as in *Golden State I*, on state interference with "the right to make use of 'economic weapons,' not explicitly set forth in the [NLRA], free of governmental interference." 493 U.S. at 110-111.

A. Respondent's Practice Of Refusing To Enforce State Wage Claims Such As Petitioner's Is Not Required By Principles Of Federal Labor Law Preemption And Interferes With Employees' Rights To Bargain Collectively

1. *Enforcement of petitioner's claim is not preempted by Section 301 of the LMRA*

Before the district court in this case, both parties agreed that respondent's policy was to enforce Sections 201 and 203 of the California Labor Code "for all employees except for those whose work is governed by [collective bargaining agreements] containing binding arbitration clauses." Pet. App. 25a. Respondent explains that the systematic policy of not enforcing wage-and-hour claims of workers covered by such contracts results from interpreting Section 229 of the California Labor Code in a manner that is "required under federal law." See Resp. Supplemental Brief in Reply to Brief for the United States as Amicus Curiae 4 [hereinafter Resp. Supp. Br.]. Section 229 of the California Labor Code states that respondent may not enforce claims involving "any dispute concerning the interpretation or application" of any collective bargaining agreement containing an arbitration clause. See note 2, *supra*. Pet. App. 8a. Respondent contends that the scope of the Section 229 bar, as construed by the California Division of Labor Standards Enforcement (DLSE), is consistent with, and required by, the preemptive force of Section 301 of the LMRA, 29 U.S.C. 185, as interpreted by this Court. See *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220 (1985); *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-410 (1986). According to respondent, claims for late payment of wages upon termination of employment are included

in the category of preempted claims that are unenforceable under state law, because determining the amount due the employee as a result of the employer's violation always requires reference to the rate of pay established by the agreement. Cf., *e.g.*, Pet. App. 8a, 26a, 43a; Resp. Supp. Br. 4-5, 6 n.4. Respondent explains that, under Section 203 of the California Labor Code, the wages due an employee who has not been timely paid continue at the "same rate" until paid; in order to establish that rate and the amount due, "it is necessary to look to the collective bargaining agreement and 'apply' that agreement." Pet. App. 8a. Since resolution of late-payment claims requires both "application" and "interpretation" of the collective bargaining agreement, those claims are preempted under Section 301 of the LMRA.

Respondent errs in concluding that wage-and-hour claims such as petitioner's are preempted by Section 301 of the LMRA. In *Lingle*, 486 U.S. at 409-410, this Court ruled that a state-law claim is preempted under Section 301 only if resolution of the claim involves interpreting a collective bargaining agreement.[5] See also *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 220 (preemption applies when "resolution of

[5] The *Lingle* Court held that a state tort claim of retaliatory discharge was not preempted, even though the employee in *Lingle* was covered by a collective bargaining agreement containing a "just cause" discharge clause, because resolution of the claim involved "purely factual questions" pertaining to the conduct of parties and "d[id] not require construing the collective-bargaining agreement." 486 U.S. at 407. The Court explained that Section 301 preemption "merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Id.* at 409.

a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract"). As the district court and the dissenting judge in the court of appeals correctly observed (Pet. App. 19a, 41a), it is not necessary to refer to the collective bargaining agreement to determine whether petitioner's late payment claim has merit. Rather, it is possible to determine whether Safeway violated its state-law obligation to make prompt payment of wages at termination without referring to the collective bargaining agreement at all. Both parties agreed on the amount that petitioner had earned and was due to be paid; the only disagreement concerned the timing of the payment. Thus, the liability determination in this case does not turn on any dispute about the precise *amount* of wages due petitioner, or about how her wages should be calculated under terms of the collective bargaining agreement governing rate of pay.[6]

[6] That is not to say that there could never be any disputes arising under the California Labor Code provisions governing wages and hours that would be preempted under Section 301. For example, this case is arguably distinguishable from *Plumbing, Heating & Piping Employers Council* v. *Howard*, 126 Cal. Rptr. 406 (Cal. Ct. App. 1975), in which the California Court of Appeal held that Section 229 of the Labor Code precluded the California Labor Commissioner from enforcing a claim for wages that arose from a dispute over whether a journeyman plumber was entitled to receive a foreman's rate of compensation for his work on a construction job. There were two collective bargaining agreements in that case that set forth the conditions under which a worker qualified as a foreman entitled to a foreman's rate of pay. The contracts apparently had to be "interpreted" and "applied," within the meaning of *Lingle, supra*, to resolve the merits of the claim. First, it was necessary to decide which contract

Moreover, and contrary to respondent's assumption, the mere fact that it might be necessary to refer to the collective bargaining agreement to determine the amount of wages due an employee as a remedy for a violation of the state wage-and-hour laws would not require preemption of the claim. Cf., *e.g.*, Pet. App. 8a, 26a, 43a; Resp. Supp. Br. 4-5, 6 n.4. As *Lingle* made clear, 486 U.S. at 413 n.12:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled.

In such a case, federal law would govern the interpretation of the agreement, but "the separate state-law analysis would not be thereby pre-empted." *Lingle*, 486 U.S. at 413 n.12. See also *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 211 ("not every dispute * * * tangentially involving a provision of a collective-bargaining agreement * * * is pre-empted by [Section] 301").[7]

applied to the particular job on which the plumber was working. Then it was necessary to interpret the applicable contract to determine whether he qualified as a foreman, which in turn determined whether the employer had paid the claimant at the correct rate.

[7] Nor, contrary to respondent's contention (Br. in Opp. 6-7 & n.9; Resp. Supp. Br. 4-5, 6 n.4), was it necessary to interpret the collective agreement to determine whether Safeway's refusal to pay petitioner upon her discharge was "willful." Safeway did not refuse prompt payment because of a disagreement over what was owed petitioner, but simply because it preferred to mail her a check. Pet. App. 2a. In any event, whether there exists a "good faith dispute" concerning whether payment is due that precludes imposition of waiting

Allowing limited reference to the collective bargaining agreement in establishing the damages due on a state-law claim is not inconsistent with the rationale underlying federal preemption of claims under Section 301 of the LMRA. Preemption seeks to preserve interpretative uniformity and predictability, as well as the role of arbitration, in resolving contract disputes. It does so by requiring that disputes over the meaning of contract terms be resolved, in the first instance, through arbitration and by applying federal law. See *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962); *Lingle*, 486 U.S. at 410-411. Looking to a collective bargaining agreement for the sole purpose of obtaining information on peripheral issues such as "rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled" (*Lingle*, 486 U.S. at 413 n.12) does not create the same threat of disuniformity, uncertainty, and avoidance of arbitration that would be presented by allowing state courts to interpret substantive contract terms to determine the parties' respective rights and responsibilities under the contract, or the existence of liability under state law.

2. ***Respondent's refusal to enforce petitioner's wage claim interferes with the exercise of her rights under Section 7 of the NLRA regardless of whether it results from an "erroneous" or overly broad application of state law***

As explained above, respondent is mistaken in his assumption that, in refusing to enforce petitioner's wage claim, he is applying Section 229 of the California Labor Code in a manner that coincides with the scope of federal preemption under Section 301 of the LMRA. Section 301 does not preempt late-payment claims such as petitioner's, and does not require that respondent refrain from enforcing such claims under state law.

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time penalties under California Labor Code Section 203 is a question of state law that can be determined without interpreting the terms of the collective agreement.

Although a State would be entitled to adopt a rule of refusing to process claims that come within the scope of this Court's doctrine of federal labor law preemption under Section 301 of the LMRA, as articulated in *Lingle*, *supra*, and other cases, respondent simply does not follow such a practice here. Respondent has in fact adopted a general rule in applying Section 229 of the California Labor Code that exceeds the scope of federal preemption: he does not enforce certain categories of wage-and-hour claims of individuals covered by collective bargaining agreements containing an arbitration clause, even where, as here, those claims do not require an interpretation of the collective bargaining agreement under this Court's decisions. By categorically refusing, without any valid justification, to enforce some types of claims of individuals covered by collective bargaining agreements containing an arbitration clause, while at the same time enforcing similar claims for the benefit of other employees not covered by such agreements, the State has in effect discriminated against the former employees based on the exercise of their rights under the NLRA. As the dissent correctly noted, respondent's refusal to enforce wage-and-hour claims under these circumstances impermissibly burdens the NLRA rights of employees in petitioner's position in two ways. First, it denies only employees "who exercise their federal labor rights" to negotiate a collective agreement with an arbitration clause the benefit of having the Commisioner press their state-

law wage claims for them free of charge. Pet. App. 20a. Second, it impedes the efforts of employees to unionize by giving employers a plausible basis for telling employees during election campaigns that if they "vote for the union," then "the state Labor Commissioner [will] abandon[] you." *Id.* at 21a & n.2.

The fact that the discrimination might be characterized as arising from a good faith "error" in applying a state law or policy that purports to coincide with the scope of federal preemption does not affect the analysis in this case. For the error, which is based on a misconception of the requirements of federal law, results in withdrawing important state protections from an entire group of employees who differ from protected employees only in having exercised their federally guaranteed rights.[8] Although the policy might not have been formulated with the express purpose of "discriminating" against workers who have chosen to be covered by a collective bargaining agreement, it nevertheless has the effect of impairing employees' federal rights by selectively treating some categories of workers covered by collective agreements less favorably than employees not so covered.

The preemption rationale for DLSE's policy, as interpreted by the court of appeals, might conceivably permit the Commissioner to pursue *some* wage-and-

[8] Many States have statutes similar to that of California. See *Individual Employment Rights Manual*, 9A Lab. Rel. Rep. (BNA) No. 60, at 519:107 (1990). The purpose of such statutes is to protect lower-wage workers who live from paycheck to paycheck and cannot afford the uncertainty of waiting weeks after termination until their employer decides to make a final payment of wages due.

hour claims of individuals covered by collective bargaining agreements.[9] Nevertheless, the pattern of enforcement dictated by such a policy would still give rise to a cause of action under *Golden State II* where, as here, the Commissioner is refusing to process a category of claims that is not in fact preempted under a correct reading of federal law. A policy that systematically results in the enforcement of *all* otherwise qualified claims of eligible employees who are not covered by collective agreements, but of only *some* claims of employees covered by such agreements, impermissibly burdens the right to bargain collectively under the NLRA, because the precondition for respondent's less favorable treatment would be the employee's exercise of Section 7 rights. Cf. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (employer's policy of refusing to hire women with pre-school-age children while hiring men with such children constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964). That burden is especially pronounced here, since many collective bargaining agreements that contain arbitration clauses customarily fix employees' rate of pay.

[9] Respondent contends (Br. in Opp. 4 & nn.5, 6) that Section 229 would not preclude him from prosecuting claims for recovery of wages paid by a check returned for insufficient funds, for recovery of employees' work tools or damages for their loss, or for recovery of state-mandated minimum wages. Also, the Commissioner presumably would take the position that he would not be barred from pursuing late-payment claims like petitioner's on behalf of employees covered by collective bargaining agreements that do not fix wages.

B. Petitioner Has A Cause Of Action Under 42 U.S.C. 1983 For Respondent's Refusal To Enforce Her Wage Claim Under State Law

The fact that respondent's actions could arguably be characterized (see Br. in Opp. 4-8) as stemming from an erroneous application of a state statute (which, if correctly applied, would not preclude enforcement of petitioner's claim) does not negate the violation of petitioner's Section 7 rights that results from that erroneous application, nor does it foreclose relief under Section 1983. In analogous situations, the courts have found unlawful the application of a facially valid policy in a manner that abridged NLRA rights or discriminated against those exercising such rights.

Thus, in *Nash* v. *Florida Industrial Comm'n*, *supra*, this Court held that a permissible state policy of denying unemployment benefits to individuals unemployed due to a labor dispute could not be applied to deny such benefits to an individual simply because she had filed an unfair labor practice charge with the National Labor Relations Board. Similarly, in *United Steelworkers* v. *Johnson*, 830 F.2d 924 (8th Cir. 1987) (en banc), the court enjoined a state official from denying unemployment benefits to union employees while granting benefits to their non-union coworkers in connection with the same labor dispute. The court acknowledged that the state statute, which prescribed an "able and willing to work" eligibility standard for unemployment benefits, was valid and could be applied to employees participating in a labor dispute, but it nonetheless held that the State had "failed to apply this test in a neutral, nondiscriminatory manner" by presuming that no union members, as opposed to non-members,

would be willing to work despite the labor dispute. 830 F.2d at 928-929. Finally, in *Rum Creek Coal Sales, Inc.* v. *Caperton*, 971 F.2d 1148 (4th Cir. 1992), the court enjoined the State's policy of not arresting picketers trespassing on a coal mine operator's property during a strike. The court acknowledged that the State's "Neutrality Statute," which barred the state police from "aid[ing] or assist[ing] either party" to "any labor trouble or dispute between employer and employee," placed a facially neutral and permissible condition upon the ability of the parties to a labor dispute to claim the services of the state police. 971 F.2d at 1150, 1154. It nonetheless held that, by interpreting the Neutrality Statute as requiring state officials to allow strikers to "prevent[] ingress and egress into [private] property," the State applied the statute in a manner that undermined the coal company's "rights to stay in business and withstand a strike," which were guaranteed under federal law. *Id.* at 1154.

These cases illustrate that the court of appeals was simply mistaken in stating that "[a] misinterpretation of a perfectly valid state statute * * * does not provide grounds for federal relief." Pet. App. 12a. And, as this Court's decision in *Golden State II* makes clear, if the misinterpretation of a facially valid state statute leads to the adoption of a policy that interferes with employees' exercise of rights under the NLRA, that interference would provide grounds for federal relief under Section 1983.

Finally, the court of appeals advanced two insubstantial reasons for concluding that, even if the Commissioner had misapplied Section 229 of the California Labor Code in refusing to enforce a claim that was not preempted under federal law, petitioner

would still have no cause of action under Section 1983. First, the court reasoned that, "[g]iven the primacy of the federal scheme for handling labor disputes," Congress "would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted." Pet. App. 14a. Rather, the court concluded, "Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." *Ibid.* As the dissent correctly responded (*id.* at 18a), however, "[t]o the extent my colleagues are divining some preemptive corona surrounding the federal labor laws, it surely cannot include that which the Supreme Court has said is *not* preempted." This Court in *Lingle* and other cases has made clear that a state-law claim is preempted under Section 301 of the LMRA only if resolution of the claim in fact requires interpreting a collective bargaining agreement. See pages 17-18, *supra;* see also *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n.28 (1983) ("we have never intimated that any action merely relating to a contract within the coverage of [Section] 301 arises exclusively under that section"). In this respect, preemption under Section 301 is more restrictive than preemption under the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959) (state jurisdiction must yield over activities that are "arguably" protected or prohibited by the NLRA). To permit Section 301 to preempt state wage-and-hour claims that do not, in fact, require interpretation of the terms of a collective bargaining agreement would advance none of the purposes the preemption doctrine is designed to serve, see page 20, *supra*, and thus would result in an unjustified discrimination against unionized employees who are covered by collective bargaining agreements.

Second, the court of appeals erred in concluding that petitioner could not sue for relief under Section 1983 because a remedy for respondent's allegedly erroneous application of state law to bar enforcement of her claim was available elsewhere: petitioner should have sought a writ of mandate against respondent in the California courts. Pet. App. 12a. As an initial matter, it is unclear whether the California courts would interpret Section 229 of the California Labor Code in a way that vindicates petitioner's rights under Section 7 of the NLRA. Section 229, on its face, prevents the Labor Commissioner from exercising jurisdiction over claims requiring the "interpretation or application of any collective bargaining agreement" containing an arbitration clause. See Resp. Supp. Br. 5-6. There is no assurance that the California courts would reject the Commissioner's administrative interpretation of that unqualified statutory language and would instead interpret it as covering only those claims that are preempted by Section 301 of the LMRA under principles set forth in *Allis-Chalmers* and *Lingle*. But, in any event, this Court has specifically recognized that Section 1983 was enacted "to provide a remedy in the federal courts supplementary to any remedy any State might have." *McNeese* v. *Board of Educ.*, 373 U.S. 668, 672 (1963). Therefore, the availability of relief under Section 1983 for a violation of federal rights "may not be defeated because relief was not first sought under state law which provided a remedy."

Id. at 671. Accord *Damico* v. *California*, 389 U.S. 416, 416-417 (1967) (per curiam); *Houghton* v. *Shafer*, 392 U.S. 639, 639-641 (1968) (per curiam). See *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961); cf. *id.* at 224-225 (Frankfurter, J., dissenting in part) (taking the position, rejected by the majority in that case, that the availability of a civil remedy under state law should bar relief under Section 1983); see also *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970) (Section 1983 relief available for discriminatory practices of state officials, "[a]lthough not authorized by written law"); *Monell* v. *Department of Social Services*, 436 U.S. 658, 690-691 (1978) (same). It follows that petitioner stated a valid claim under Section 1983 and is entitled to appropriate relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1993

KAREN LIVADAS,

Petitioner,

-against-

LLOYD AUBRY, in his official capacity as Labor Commissioner for the State of California,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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EDITOR'S NOTE

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INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of AEF include representatives of business, labor and the general public.

It is the belief of AEF that the ability of labor and management to resolve disputes in an atmosphere of equality is vital to the strength of the economy of the United States. Unnecessary government interference upsets this balance and creates a risk of economic strife that weakens the American economy. The judicial process is a critical area for maintaining a free society, and the public interest is best served by a legal structure that permits, to the fullest extent possible, the resolution of disputes between employers and employees by collective bargaining, with a minimum of governmental interference, in the free pursuit of the negotiating process by both sides. AEF is concerned that a determination adverse to the position of the petitioner in this matter will effectively sanction inappropriate governmental interference in the collective bargaining process.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief by AEF on behalf of petitioner.

STATEMENT OF THE CASE

Petitioner was terminated from her job at Safeway Stores in Napa County, California on January 2, 1990. In connection with her employment, she was covered by a collective bargaining agreement between Safeway Stores and her union, the United Food and Commercial Workers, AFL-CIO. Upon receiving notice of her termination, petitioner requested that her employer make payment of her earned and unpaid wages. Section 201 of the California Labor Code requires all employers to remit unpaid wages to discharged employees immediately upon termination. Instead of paying such wages on termination, however, petitioner's employer mailed her a check in the amount of her unpaid wages, which she received on January 5, 1990. Apparently, there is no dispute that the amount of this check did, in fact, represent all unpaid wages owed to petitioner.

Petitioner thereafter complained to the California Division of Labor Standard Enforcement (the "DLSE") that, pursuant to Section 203 of the California Labor Code,[1] her employer should be penalized for its failure to have given to her all outstanding wages on the date of

[1] That statute provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Section[] 201 . . ., any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid." Cal. Lab. Code § 203 (West 1989).

her termination. However, the DLSE refused to process petitioner's claim for a penalty. Citing Section 229 of the California Labor Code,[2] the DLSE contended that its prosecution of petitioner's claim would necessitate an "application" of a collective bargaining agreement containing an arbitration clause and that petitioner's claim was, as a result, pre-empted by federal labor laws.

Petitioner thereafter filed a complaint against respondent, in his capacity as Labor Commissioner of the State of California (and head of the DLSE), seeking injunctive and declaratory relief as well as money damages, under 42 U.S.C § 1983, on the ground that respondent's enforcement of Section 229 of the California Labor Code effectively deprives employees such as petitioner, who are covered by collective bargaining agreements containing arbitration clauses, from access to the investigatory, prosecutorial and remedial resources afforded under the California Labor

[2] That statute provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

Cal. Lab. Code § 229 (West 1989).

Code. The gravamen of the complaint is that the DLSE's refusal to prosecute petitioner's claim against her employer interferes with her rights under the National Labor Relations Act (the "NLRA"), 29 U.S.C § 151 *et seq.*, placing employees such as petitioner at a disadvantage as a result of their being members of a union that has negotiated a collective bargaining agreement and denying them access to a governmental service based upon their union membership.

SUMMARY OF ARGUMENT

Section 7 of the NLRA provides employees with a federally protected right to uninhibited, unconditional participation in the collective bargaining process. Respondent undermines that right by a policy of refusing to prosecute wage-and-hour claims of employees who are covered by collective bargaining agreements containing arbitration clauses. Invariably, union members are covered by collective bargaining agreements that contain arbitration clauses. As a result, respondent's policy denies union members of a valuable governmental service simply on the basis that they are unionized. On that basis, respondent's enforcement of the policy violates 42 U.S.C. § 1983.

Furthermore, because petitioner's state law claim against her employer does not involve the interpretation of a collective bargaining agreement, respondent's policy is not mandated by federal pre-emption principles.

ARGUMENT

Petitioner seeks to enforce her federally protected right to participate in her union's collective bargaining process without being forced to forfeit a right that she would otherwise possess under state law. The essential issue in this appeal is whether, solely on the basis of petitioner's coverage under a collective bargaining agreement containing an arbitration clause, the DLSE could refuse to afford benefits provided by state law to all employees.

Ironically, both sides' in this action purport to be taking positions in furtherance of the policies underlying the NLRA. Petitioner maintains that, by implementing a policy of refusing to prosecute state law claims of employees covered by collective bargaining agreements containing arbitration clauses, respondent and the DLSE discriminate against union members and interfere with their federally protected right to participate in their unions' collective bargaining activities. Respondent argues that the DLSE's position reflects a pre-emption of state law claims such as that asserted by petitioner in favor of federal guidelines for collective bargaining and arbitration of labor disputes.

I. Respondent's Refusal To Prosecute State Labor Claims Of Employees Covered By Collective Bargaining Agreements Containing Arbitration Clauses Violates 42 U.S.C. § 1983

Both petitioner and respondent agree that the DLSE provides certain valuable protections and benefits to all California employees except those covered by the provisions of collective bargaining agreements containing arbitration clauses. Based upon this inequality, both of the lower courts concurred that respondent's refusal to prosecute petitioner's claim violated 42 U.S.C. § 1983 by impairing petitioner's right, under Section 7 of the NLRA, 29 U.S.C. § 157, to participate in a labor union and in the collective bargaining process without undue governmental interference. *See Livadas v. Aubry*, 943 F.2d 1140, 1142-43 (9th Cir. 1991); *Livadas v. Aubry*, 749 F. Supp. 1526, 1533-35 (N.D. Cal. 1990).

These holdings are consistent with the two-step approach to determine liability under 42 U.S.C. § 1983 prescribed by this Court in *Golden State Transit Corp. v. City of Los Angeles ("Golden State II")*, 493 U.S. 103 (1989), and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). The first step involves inquiry concerning whether there was a violation of a federal right. *Golden State II*, 493 U.S. at 106. To make this determination, the Court asked "whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.'" *Id.* (citations omitted). There must also be a determination whether "the provision in question was 'inten[ded] to benefit' the putative plaintiff." *Id.* (citations omitted).

Upon a finding that a federal right has legitimately been invoked, the second step prescribed in *Golden State II* and *Middlesex County* involves a determination whether Congress "'specifically foreclosed a remedy under § 1983' . . . by providing a 'comprehensive enforcement mechanism for protection of a federal right.'" *Golden State II*, 493 U.S. at 106 (citations omitted). In *Golden State II*, involving facts analogous to those at bar, the Court definitively ruled that there has been no such foreclosing of a § 1983 remedy:

> Although the National Labor Relations Board . . . has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct protected by the NLRA against governmental interference. There is thus no comprehensive enforcement scheme for preventing state interference with federally protected rights that would foreclose the § 1983 remedy.

Id. at 449-50 (footnote omitted).

All that remains is whether respondent's policy of excluding from the DLSE's protection employees covered by collective bargaining agreements containing arbitration clauses constituted impairment of a federal right. It is respectively submitted that this issue, too, should be resolved in petitioner's favor for the same reason that a finding was made on behalf of petitioner in *Golden State II*:

> We agree with petitioner [Golden State Cab Co.] that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983.

Id. at 109. "We have held, based on the language, structure, and history of the NLRA, that the Act protects certain rights of labor and management against governmental interference." *Id.* at 111.

Although, to the parties, the stakes in this action are relatively small, the prospective impact of the Ninth Circuit Court of Appeals' decision, which holds that the DLSE properly refused to prosecute petitioner's claim, is huge. The exclusion of unionized workers from state worker protection laws could easily disrupt the "balance of power designed by Congress" that this Court has referred to in the context of employer-employee relations. *Golden State Transit Corp. v. City of Los*

Angeles ("*Golden State I*"), 475 U.S. 608, 619 (1986). Indeed, a real danger exists that such a disruption of the employer-employee relationship could create a chilling effect on the collective bargaining process. For example, employees considering whether to join a union would first have to weigh the value of lost state labor benefits against the benefit of union membership. This factor places an unfair burden on the union in collective bargaining, inasmuch as employers do not lose any of their comparable state-law rights when they enter collective bargaining. Indeed, the prospect of loss of state labor-law protection that results from the decision of the Ninth Circuit Court of Appeals could be a powerful weapon in the hands of an anti-union employer.[3]

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[3] Such an effect is precisely what Judge Kozinski warned of in his dissent from the decision of the Court below: "It is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: 'Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you.' In a closely fought election, this type of argument might make a difference." *Livadas v. Aubry*, 943 F.2d 1140, 1150 (9th Cir. 1991) (Kozinski, J., dissenting). Such a scenario would be tragically inconsistent with a fundamental tenet of American labor law that the government should foster employee organization and promote equity in bargaining between employers and employees. For example, the findings and policies set forth in the National Labor Relations Act provide, in pertinent part:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from

As this Court stated in *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.

Id. at 180. The Court has also recognized that "both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (citations omitted). Just as an

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> injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151; *see also NLRB v. Jones & Laughline Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

employer comes into negotiations with the authority under state common law to exercise fundamental managerial prerogatives, workers come to collective bargaining with certain legal rights that underpin their bargaining position, such as the protections afforded to all employees by state labor laws. *See id.* Consistent with this balance of power, this Court has consistently ruled that unionized workers should not be penalized for their collective bargaining activity by the loss of minimum state labor standards. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimum standards on nonunion employers."

To see that petitioner, and those like her, are the intended beneficiaries of these principles underlying Section 7 of the NLRA, one need look no further that *Golden State I*. There, the City of Los Angeles refused to renew petitioner's taxi franchise unless petitioner settled a pending strike with its employees. This Court held that petitioner had a federally protected right to deal with or to negotiate a resolution of the strike. Although the taxi franchise was considered a privilege, the Court held that the City could not condition receipt of that privilege "in a way that intrudes into the collective bargaining process." *Golden State I*, 475 U.S. at 619. Similarly, in the action at bar, the only way for petitioner (and those like her in the State of California) to receive the "privilege" of enforcement by the DLSE of

Section 203 of the California Labor Code would be for her to relinquish her federally protected right to participate in her union's collective bargaining process. Accordingly, the DLSE's refusal to prosecute petitioner's state law claim constitutes action "under color of state law" that impairs petitioner's federal statutory rights, in violation of 42 U.S.C. § 1983.

The policy under which respondent claims that the DLSE was acting in refusing to prosecute petitioner's claim against her employer plainly discriminates against citizens on the basis of the exercise of their right to organize, which is protected under the NLRA. The Ninth Circuit's tolerance of such discrimination on the ground that the state labor law, as applied to employees covered by collective bargaining agreements containing arbitration clauses, is pre-empted by federal labor law constitutes a "gutting" of the principles set forth in *Golden State I* and its progeny, *Livadas v. Aubry*, 943 F.2d 1140, 1150 (9th Cir. 1991) (Kozinski, J., dissenting), and should, therefore, be reversed. The concept expressed by the court below asks those who support themselves by their own toil to decide whether they want the protection of state law or of a union. They are entitled to both, and to impose such a choice has to impede the right to organize and collectively bargain in connection with issues not covered by state law.

II. Petitioner's State Law Claim Is Not Pre-empted By Federal Labor Law

Contrary to the argument made by respondent, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1978), does not pre-empt claims such as the one made by petitioner against her employer. In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), this Court applied the pre-emption doctrine to reverse the dismissal of plaintiff's state law claim by the Wisconsin Supreme Court. In particular, the Court found that state rules that, independent of a collective bargaining agreement, "proscribe conduct, or establish rights and obligations, independent of a labor contract," are not pre-empted. *Id.* at 212. The threshold question is whether the state law claim is "inextricably intertwined with," *id.* at 213, and "substantially dependant upon the analysis of terms of" the collective bargaining agreement. *Id.* at 220. Only under those circumstances is the state law pre-empted.

In *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Court further clarified the pre-emption doctrine as follows:

> [If] the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-

> empted and federal labor-law principles--necessarily uniform throughout the nation --must be employed to resolve the dispute.

Id. at 405-06 (footnote omitted). Therefore, if resolution of the claim requires *interpretation* of the terms of a collective bargaining agreement, the state law would properly be deemed pre-empted by federal labor law. *Id.* at 407 n.7. Applying this standard to the facts in *Lingle*, the Court analyzed the elements of plaintiff's state tort claim of retaliatory discharge for filing a workers' compensation claim: "'(1) he was discharged or threatened with discharge and (2) the employers' motive . . . was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights.'" *Id.* at 407 (citations omitted). In defending against such a claim, the employer "must show that it had a nonretaliatory reason for the discharge." *Id.* Based upon this analysis, the Court held, "the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.*

Applying this standard to the case at bar, the Ninth Circuit Court of Appeals can be seen to have made the same error as the Seventh Circuit Court of Appeals was found to have made in *Lingle*.[4] Liability

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[4] *See Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1044-46 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988).

under Section 203 of the California Labor Code is based upon an employer's being shown to have willfully failed to remit earned and unpaid wages of an employee who is discharged or quits, in the manner prescribed in Section 201 (i.e., "immediately" upon termination of employment). If such a showing is made, the employer is to be directed, as a penalty, to pay additional wages, "at the same rate," from the date of termination until the date of final payment of earned and unpaid wages. Cal. Lab. Code 203 (West 1989).

The single justification offered by the DLSE for its policy is that, as applied to employees covered by collective bargaining agreements containing arbitration clauses, Section 203 is pre-empted by federal labor law because determining "the same rate" of wages would necessitate "application" of the collective bargaining agreement.[5] However, that is plainly incorrect. In most cases, and certainly in this case, there is no interpretive issue concerning the "rate" at which the employee was paid prior to termination. At most, the collective bargaining agreement might be referred to for mechanical application, but never "interpreted." As such, the penalty petitioner sought against her employer was nothing more than "tangentially involving a provision of

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[5] In a letter to appellant, the DLSE supported its position, *inter alia*, as follows: "'In order to establish what the "same rate" was [for the purposes of Section 203 of the Labor Code], it is necessary to look to the collective bargaining agreement and "apply" the agreement.' *Livadas v. Aubry*, 943 F.2d 1140, 1144 (9th Cir. 1991).

a collective bargaining agreement." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *See, Livadas v. Aubry*, 749 F. Supp. 1526, 1534-35 (N.D. Cal. 1990), rev'd 943 F.2d 1140 (9th Cir. 1991). Accordingly, allowing petitioner to prosecute her Section 203 claim here would not at all impact upon what this Court has characterized as "the most harmful aspect" of state labor law claims--that is, the avoidance of the arbitration process that the parties to the collective bargaining agreement had agreed upon to resolve contract interpretation disputes. *Lueck*, 471 U.S. at 219.

This case is virtually indistinguishable from *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), where this Court rejected a claim that the NLRA pre-empted a state statute providing a one-time severance benefit to employees in the event of a plant closing. "[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Id.* at 21.

In California, the legislature established certain such labor standards in the form of Section 201 of the Labor Code. Regrettably, in an apparent attempt to anticipate federal pre-emption principles, the legislature also enacted Section 229 of the Labor Code. However, federal pre-emption operates whether states recognize it or not. As this Court held in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988):

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. . . . In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted.

Id. at 413 n.12. Here, petitioner relies on no provision of the state labor laws that offends federal law. Instead, federal law is compromised by the DLSE's exclusion of unionized workers from state labor laws it is supposed to enforce equally for all employees.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be reversed, and respondent should be directed to enforce Sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's employment being subject to a collective bargaining agreement having an arbitration clause. An employee's statutory right to have the State, under its police powers, assure the immediate payment of wages upon the termination of employment should not be denied as a result of membership in a union. It is not equal enforcement that is offensive to federal law,

it is the denial of equal enforcement that is prohibited by federal law.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1993

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v.
LLOYD AUBRY, LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief amicus curiae is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 86 national and international labor organizations with a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for in the Rules of the Court.

SUMMARY OF ARGUMENT

In Part I of this brief we consider respondent's understanding that it would be inconsistent with federal labor policy to extend the coverage of state wake laws to employees covered by labor agreements with arbitration

clauses. We show that this Court has held that protecting employees in modern industrial society through state minimum labor standard laws is not contrary to, but, instead, the base upon which the federal collective bargaining laws rest. Thus, the states, like the federal government, may establish public law minimum substantive protections for all employees, including employees covered by collective bargaining agreements.

We then demonstrate that no policy inherent in § 301 of the LMRA suggests any different result. That provision was intended to assure that agreements secured through collective bargaining would be enforceable through a uniform body of federal law. Nothing in that law, or in this Court's previous decisions that consider its preemptive force, supports the view that the need for uniform enforcement of labor agreements requires the wholesale eradition of state law claims whenever resolution of those claims requires reference to the terms of a labor agreement. Neither the federal policy requiring uniformity in interpreting labor agreements, nor the policy favoring arbitration of workplace disputes under collectively bargained arbitration schemes supports respondent's position.

In Part II we discuss the inverse of the proposition analyzed in Part I: whether a law whose effect is to deprive unionized workers of the benefits of state minimum standards laws—far from being *required* by federal labor policy—so burdens the functioning of the federal scheme as to be in conflict with that scheme. We demonstrate that when a state deprives unionized workers of the benefits of its state minimum labor standards laws on a mistaken view of the incompatibility of the two systems of worker protection, the result of its actions is simply to punish employees who have completed the process of collective bargaining. For that reason, a law like Cal. Code § 229 that as applied effectively deprives most unionized workers the benefit of the state wage laws impermissibly burdens the federal scheme.

ARGUMENT

I. FEDERAL LABOR POLICY DOES NOT REQUIRE STATES TO EXCLUDE UNIONIZED WORKERS FROM THE PROTECTIONS OF THEIR MINIMUM STANDARD EMPLOYMENT LAWS.

California for many years has had in place wage laws that require, among other things, that employees be paid at specified intervals and in a specified manner. Such laws are the norm in state labor codes. Virtually every state has made the judgment that employees, especially employees with limited income, are dependent upon regular wage payments to meet their basic human needs. The resulting statutory provisions are a basic component in our system for regulating employment, a paradigm example of a public law minimum substantive protection for individual employees.[1]

Respondent nevertheless argues that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, preempts the application of such state wage laws to employees covered by a collective bargaining agreement with an arbitration clause, because the remedy provided in the law requires in every case calculation of the wage due, which in turn requires "application of a collective bargaining agreement." Pet. App. 26a, citing Cal. Code § 229. Virtually all state wage laws—indeed virtually all state employment laws of any kind that provide the standard remedy of backpay—require a similar calculation. If respondent is correct as to the preemptive scope of LMRA § 301, most state wage laws as applied to unionized workers would be preempted.

The AFL-CIO is the last organization to minimize the benefits of collective bargaining and the efficacy of labor contract arbitration, or to oppose preemption doctrines necessary to ensure the effective operation of the collec-

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[1] See Bureau of National Affairs, Labor Relations Reporter, State Laws, summarizing the regulations of the 48 states that have adopted such provisions.

tive bargaining system instituted by the National Labor Relations Act of 1935 ("NLRA"), as amended in 1947 by the LMRA. We nevertheless think it clear that respondent's view of the preemptive force of federal labor law in this area rests upon a fundamental misunderstanding of that law.

A. It facilitates analysis to begin by fixing LMRA § 301's place within the overall NLRA-LMRA statutory scheme of which it is a single piece. These federal enactments protect the right of employees "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7, 29 U.S.C. § 157. Where employees choose to exercise that right by selecting an exclusive bargaining representative, NLRA §§ 8(a)(5), 8(b)(3) & 8(d) require the employer and the employee representative to bargain in good faith over wages and other terms and conditions of employment, and LMRA § 204(a)(i) enjoins the parties to "exert every reasonable effort to make and maintain [collective bargaining] agreements."

LMRA § 301, in its turn, dictates that where collective bargaining results in an agreement, that agreement shall be enforceable in the federal courts:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . . [29 U.S.C. § 185(a).]

Moreover, as this Court explained in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985),

> [i]n *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), the Court ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases "is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. That seminal case understood § 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts.

And, in *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962), the Court resolved the "choice of law" question inherent in *Lincoln Mills* by ruling that these federal common law principles must apply in all breach of labor contract cases, whether brought in state or in federal court. Thus the Court declared federal contract law paramount, and state contract law preempted, when courts are presented with labor contract claims.

The federal labor law, then, is an integrated whole that governs the successive stages of a single process enabling employees to unionize, and employers and employees to bargain collectively and reach binding and enforceable agreements embodying the results of their bargain.

B. This is not the first time that this Court has considered how this federal law of collective bargaining was intended to relate to state minimum labor standards laws. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court considered the claim that the NLRA system of free collective bargaining preempts such state laws. In this regard, the appellants argued that Congress "intended to prevent the states from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining position." *Id.* at 751. The *Metropolitan Life* Court unanimously rejected that argument. In so doing, the Court emphasized four propositions critical to the instant case.

First, regulation of the employment relationship in the form of public law minimum labor standards embodied in countless legislative enactments at both the federal and state levels, dates back a hundred years. Such enactments

include, for example, "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, . . . [s]tate laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payments to employees for time spent at the polls or on jury duty." 471 U.S. at 756 (internal quotations omitted).

Second, both federal and state minimum labor standard laws have governed "union and nonunion employees equally," 471 U.S. at 755, and have done so by establishing public law norms that operate "independent of the collective-bargaining process," and that "devolve on [employees] as individual workers, not as members of a collective organization," *id.* (quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981)).

Third, Congress "developed the framework for self-organization and collective bargaining of the NLRA within th[is] larger body of state law promoting public health and safety" and did not "intend[] to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." 471 U.S. at 756. Accordingly, Congress conceived of the collective bargaining system as one that enables workers, through collective action, to enhance their employment conditions, above minimum public law standards. "No incompatibility exists, therefore, between federal rules designed to [protect collective bargaining] and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least as long as the purpose of the state legislation is not incompatible with the[] general goals of the NLRA." *Id.* at 754-756. Indeed, Congress has reaffirmed this judgment repeatedly over the years, as Congress "has . . . [n]ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards." *Id.* at 755. And, the Court has

noted that there is "no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards." *Id.*

Finally, the Court noted that the federal collective bargaining scheme would be endangered if individual workers were to be denied state minimum labor standards protections should those workers choose to unionize and engage in collective bargaining: "It would turn the policy that antimated the Wagner Act on its head to . . . penalize[] workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employees." 471 U.S. at 756.

C. *Metropolitan Life* settles the proposition that the federal labor laws do *not* preempt state minimum labor standards laws during the organizing process governed by NLRA-LMRA scheme or during the collective bargaining process, also governed by that scheme. The remaining question—and the one presented here—is whether once collective bargaining negotiations result in an agreement, the mechanism for the enforcement of the agreement—LMRA § 301—requires the very same laws to give way. The logic of the situation all but compels the conclusion that the answer is "No."

First, as we have noted, the *Metropolitan Life* Court, after canvassing the NLRA-LMRA legislative materials, concluded that Congress developed the federal labor laws "within the larger body of state law promoting health and safety" and did not by enacting the federal labor laws "intend to disturb the myriad state laws then in existence that set minimum labor standards." 471 U.S. at 756.

Nothing in the LMRA § 301 legislative materials shows a different intent. So far as we can find, there is not a word in § 301 or in the reports and floor statements pertaining to that provision so much as suggesting that the federal law of labor contracts would displace state minimum labor standards laws. That parallel is precisely

what one would expect; § 301, after all, is not a free-standing provision animated by a set of purposes and concerns separate from those that animate the NLRA-LMRA scheme as a whole, but an integral part of that scheme.

Second, LMRA § 301's particular office in the federal labor law is not one that supports, much less requires, the preemption of state minimum labor standards laws. The point of § 301 is to make collective bargaining agreements *enforceable*. The means to that end is a grant of jurisdiction to the federal courts over suits for violation of such agreements, and a charge to develop a *uniform federal labor contract law* to govern such suits.

No principles of law are better settled than that private agreements are negotiated against the background of the applicable public law and that such private agreements are supplemental or subordinate to, not paramount over, public law. *E.g., Mineworkers v. Pennington*, 381 U.S. 657, 665 (1965) (because unions have a right to "bargain does not mean that the agreement reached may disregard other laws"). *See generally*, Restatement (Second) of Contracts, § 178, comment a (a "court is bound to carry out the legislative mandate with respect to the enforceability of [any] contract term"). Indeed, this Court has already ruled that § 301 conforms to these principles: "Clearly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985).

Given these principles, and *Metropolitan Life*'s recognition that the federal law governing the negotiation of collective bargaining agreements does *not* preempt state minimum standard laws, it is all but inconceivable that the federal law governing the enforcement of the resulting collective bargaining agreements would have that more far-reaching preemptive effect.[2]

[2] The *Metropolitan Life* Court was well aware of the § 301 preemption issue. That case was decided later in the same term the Court decided the seminal § 301 preemption case, *Allis-Chalmers Mfg. Co. v. Lueck, supra*. Indeed, *Metropolitan Life* cited the *Lueck* decision for the proposition that federal law could not be understood to have sanctioned penalizing workers who choose to join a union by depriving them of the benefits of state minimum labor standard laws. 471 U.S. at 756.

D. Four times in recent years, the Court has confronted the question presented here: when does the § 301 federal common law of labor contracts preclude state causes of action from going forward where the plaintiff is an employee covered by a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck, supra, Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). *See also Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990). None of these cases, fairly understood, support respondent's view of § 301 preemption.

In *Allis-Chalmers, supra*, the Court for the first time considered the preemptive force of § 301 in a case that was not styled as a suit to enforce a labor agreement. In that case, the plaintiff, an employee covered by a collective bargaining agreement, brought what he labelled a state tort action for breach of the duty of good faith in failing to honor an insurance provision in the agreement. Analyzing the state law, the Court determined that in substance the state tort was nothing more than a breach of contract claim pleaded in tort. Had the matter been pleaded as a breach of contract, the plaintiff would have been required to arbitrate the claim pursuant to the contract's arbitration clause, and—had a breach been established—would have been awarded contractual damages. By pleading the claim as a tort, plaintiff sought to avoid the arbitral process and the limited contract damages that would have otherwise applied.

To have allowed such a result, the Court concluded, "would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their con-

tract claims as claims for tortious breach of contract." 471 U.S. at 211. *See also Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 22-23 (1983). As the *Allis-Chalmers* Court explained, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement must be resolved by reference to uniform federal law." 471 U.S. at 211.

Lest it be misinterpreted as having uncovered some more expansive preemptive intent in § 301, the Court also added:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301. . . . In extending § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract. [471 U.S. at 212.]

This Court's subsequent decisions reiterate the same principle: Section 301 preemption is designed to assure that if the parties to collective bargaining negotiate for certain *contract rights*, and as well negotiate for arbitration of claims arising out of those bargained-for-rights, they will be assured the benefit of their collective bargain through application of a uniform body of federal law. A state law claim, whatever its label, that states in substance that the defendant denied the plaintiff a *contract right*, does nothing more than give force to a private contractual agreement. Such a law is not a law "independent of a labor contract," but in substance a contract law that § 301 preempts.

At the same time, *Allis-Chalmers* and its progeny confirm that nothing in § 301 draws into questions state laws that *are* independent of the labor agreement; *viz.*, laws that grant employees a *public law right* and employers a corresponding public law obligation—whether or not

the employee is covered by a collective bargaining agreement. An employee filing a claim under such a state law makes out his substantive case without having to show that the employer breached a collective bargaining agreement, or any other private agreement. And, such an agreement comes into play only to provide a subsidiary fact (for example, in this wage case, the time at which wages were to be paid or the amount of the wages) or if the employer-defendant so chooses as a defense. Such tangential references to a labor contract cannot be said to change the independent nature of the state minimum labor standards law or of the employee's claim founded on that law. *See, e.g., Hechler*, 481 U.S. at 859 (§ 301 preemption turns upon whether the state law duty relied upon "was one without existence independent of the collective-bargaining agreement"); *Caterpillar*, 482 U.S. at 395 ("a plaintiff covered by a collective bargaining agreement is permitted to assert [in state court] legal rights *independent* of that agreement") (emphasis in original). *See also, Rawson*, 110 S. Ct. at 1911 ("questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law" (citing *Allis-Chalmers*); *see also id.* at 1915 (Kennedy, J., dissenting) (agreeing that "a State cannot circumvent our decisions in *Lingle*, *Hechler*, and *Allis-Chalmers*, by the mere 'relabeling' as a tort claim an action that in law is based upon the collective bargaining process").

E. To be sure, as the decision below shows, the lower courts have tended to read this Court's § 301 preemption decisions—and most particularly the *Lingle* decision—as standing for a different and broader principle. That principle is that when employees covered by a collective bargaining agreement (or, as in the instant case, an agreement with an arbitration clause) assert a claim based upon what is alleged to be a state minimum labor standards public law right, to determine whether the claim is pre-

empted, the court looks, not to the independence of the state *public law right* asserted from any *labor contract right,* but instead to whether resolution of the claim that rests on the public right entails some specified quantum of contract interpretation. On this theory, if resolution of the employee's minimum labor standards law claim entails more than that quantum of contract interpretation, the claim is preempted, without regard to whether the *public law right* asserted is independent of any contract right, or is instead, in essence, a contract right.

The quantum of contract interpretation said to trigger § 301 preemption varies wildly. In its most modest form, a state minimum labor standards law claim is said to be not preempted unless the validity of the claim turns on the contract interpretation question. At the other extreme, such a claim is said to be preempted whenever a *defendant* asserts as an affirmative defense that there is a contractual justification for its action, regardless of the merits of that defense. In its most modest formulation, then, the same state law claim may be preempted or not depending on the facts that are in dispute in a particular suit brought under the state law. In its strongest form, as in the instant case, § 301 is said to require preemption of state minimum labor standards law claims when a question turning on the labor contract is present even though there is no dispute over the contract's meaning. But in all of its forms, the "quantum of contract interpretation" test looks to whether contract interpretation questions are at least conceivably present in cases brought under the state minimum labor standards law, rather than to whether the state law is a "contract" law, *viz.*, a law concerned with the enforcement of private contract rights.

At the least, these decisions require unionized employees to pursue remedies through labor arbitration under analogous provisions in their collective bargaining agreement. But, as in this case, the doctrine typically has a far greater substantive effect. Labor contracts do not necessarily include provisions that create contract rights analogous to rights provided by state minimum labor standard laws. And, as we discuss in more detail, *infra,* labor contract arbitration is typically limited to resolution of contract claims, and is not intended by the contracting parties to be a vehicle to resolve claims derived from other sources of law.

Thus, as we noted at the outset, in most cases the "quantum of contract interpretation" approach has the practical effect of depriving unionized employees of the protection of a wide variety of substantive state public law rights of general applicability that do *not* derive from any private contractual agreement [3]—rights of privacy,[4] rights against wrongful discharge,[5] rights against retaliatory discharge,[6] slander,[7] and, as here, rights derived from wage laws.[8]

Thus, for example, the courts of appeals are now split on whether state intentional infliction of emotional distress claims should be preempted when the alleged invasion took place in a unionized workplace, if the employer

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[3] While by far the greatest danger of "contract interpretation" preemption is that it preempts claims that should not be preempted, we observe as well that the doctrine is also underinclusive. For example, at least one court has found not preempted a state law fraud claim based upon the fraudulent negotiation of a labor agreement, reasoning that it need not interpret the labor agreement to resolve the case under state law. *See Operating Engineers v. Wilson,* 915 F.2d 535 (9th Cir. 1990), *cert. denied,* 112 S.Ct. 3013 (1991).

[4] *Jackson v. Liquid Carbonic Corp.,* 863 F.2d 111 (1st Cir. 1988); *Schlacter-Jones v. General Telephone,* 936 F.2d 435 (9th Cir. 1991); *Strikes v. Chevron USA, Inc.,* 914 F.2d 1265 (9th Cir. 1990); *Utility Workers v. Southern California Edison,* 852 F.2d 1083, 1086-87 (9th Cir. 1988); *Laws v. Calmat,* 852 F.2d 430 (9th Cir. 1988).

[5] *Johnson v. Anheuser Busch, Inc.,* 876 F.2d 620 (8th Cir. 1989).

[6] *Magerer v. John Sexton & Co.,* 912 F.2d 525 (1st Cir. 1990).

[7] *Johnson v. Anseuser Busch, Inc., supra.*

[8] *Pennsylvania Federation of BMWE v. National R.R. Passenger Corp.,* 989 F.2d 112 (3rd Cir. 1993).

defendant asserts as an affirmative defense that its conduct can arguably be justified by the "management rights" clause of the labor agreement. In finding such a claim to be preempted on this rationale, the Fourth Circuit in *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531 (1991) (*en banc*), cert. denied, 112 S. Ct. 912 (1992), did not feel the need to consider whether the management rights clause did in fact justify the conduct, whether, if the clause did so, the state law protection could in any event be negated through negotiation of such a clause, or whether the state law protection is, in fact, waived. Instead, invocation of the collective bargaining agreement in the defense was, *without more*, enough to deprive unionized workers the protections of Virginia's tort law, on the theory that § 301 mandated such a result.[9]

The litigating elucidation of the "quantum of contract interpretation" standard has served to demonstrate that it is so contrary to normal contract concepts, so devoid of any basis in federal labor policy, and so evanescent in its formulation that it cannot be held in the mind. The lower court decisions relying upon this test have resulted in a set of *ad hoc* decisions that purport to accommodate both the "quantum of contract interpretation" test and an exception for "incidental" contract interpretation that are in hopeless conflict.[10]

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[9] Accord, *Brown & Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1256 (5th Cir. 1990); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990); *Johnson v. Anheuser Busch, Inc., supra*, 876 F.2d 620 (8th Cir. 1989). Contra, *Krashna v. Oliver Realty, Inc.*, 895 F.2d 11 (3rd Cir. 1990); *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989); *Hanks v. General Motors Corp.*, 906 F.2d 341 (8th Cir. 1990).

[10] As the Ninth Circuit has observed, LMRA § 301 preemption has become "one of the most confused areas of federal court litigation:"

> [S]ection 301 has been the precipitate of a series of often contradictory decisions, so much so that "federal preemption of state labor law has been one of the most confused areas of federal court litigation." *Note, the Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209 (1989). [*Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991).]

F. We do not believe that this "quantum of contract interpretation" preemption standard is fairly derived from this Court's decisions. As courts applying such a standard typically rely on language from this Court's decision in *Lingle*, we turn to consider the Court's formulation of the § 301 preemption test in that decision.

At the outset, we acknowledge that it is no easy matter to formulate a reasonably succinct rule of law that captures the distinction between a state minimum labor standards law that is independent of a collective bargaining agreement, and a state law that rests on a collective bargaining agreement right. State minimum labor standard laws are typically stated in general terms—that employees shall not work more than a set number of hours, that employees shall not be discriminated against on a stated basis, etc.—while the specifics of the employment relationship are worked out in a set of understandings promulgated unilaterally by the employer in unorganized workplaces, or in a collective bargaining agreement in unionized workplaces. As this case shows, it is all but inevitable that a state minimum labor standards case will require some reference to those concrete understandings. Thus, while the basic distinction here is between "state rules that proscribe conduct or establish rights and obligations independent of a labor contract," *Allis-Chalmers*, 471 U.S. at 212, and state rules that rest on a contract right, the word "independent" cannot mean totally without any relation to any labor contract. Instead, the phrase embodies the concept of a state law that creates a substantive public right that stands on its own, and does not require a claimant in order to prevail to prove a "contract right" or that a defendant-employer breached a contract in any way. As the Court recognized in *Lingle*:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate

> state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . ." [471 U.S. at 413, n.12.]

The Court has therefore essayed a number of formulations of the governing § 301 preemption rule which the *Lingle* opinion collects. The *Lingle* Court thus summarized *Allis-Chalmers* as holding "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute." 486 U.S. at 405-06. And to clarify what kind of "dependence" was at issue, the Court then quoted that portion of the *Allis-Chalmers* decision that analyzed and identified the dependent nature of the state tort claim at issue in that case: "We then analyzed the Wisconsin tort remedy, explaining that it 'exists for a breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.' " 486 U.S. at 450 (*quoting Allis-Chalmers*, 471 U.S. at 216, *quoting in turn* Wisconsin law).

In a footnote to that passage, *Hechler, supra,* was said to have "applied this same principle of § 301 pre-emption and to have resulted in a judgment that a Florida law was preempted because it was contract based. "Our analysis of Florida law revealed that '[t]he threshold inquiry for determining if a [state tort] cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties.' " 486 U.S. at 406, n.4.

Later the *Lingle* Court quoted from *Caterpillar Inc., supra,* as follows:

> Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' . . . [C]ontrary to Caterpillar's assertion, . . . respondents' complaint is not substantially dependent upon interpretation of the collective bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement. As the Court has stated, "it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis-Chalmers Corp., supra,* at 212. [486 U.S. at 410, n.10.]

And, finally in this regard, the *Lingle* Court found the following passage from *Atchinson, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 564-565 (1987), instructive:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*" *Barrentine, supra,* [450 U.S.] at 737. [486 U.S. at 411-12 (emphasis in original).]

Lingle sums up all the foregoing by stating that "§ 301 preemption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does *not depend upon* the interpretation of such agreements," 486 U.S. at 409 (emphasis added), and "an application

of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application *requires* the interpretation of a collective-bargaining agreement, *id.* at 413 (emphasis added).

The words used in the various formulations of the § 301 test reviewed with approval in *Lingle* are not uniform, but each points towards a consideration of the plaintiff's *claim* and an analysis of whether that claim is based on a contract right or is instead based upon an independent public law right. Reviewing the decision as a whole, rather than pulling from it phrases about "contract interpretation," the fair conclusion is that the adjudication of a claim "depends" on the interpretation of a collective bargaining agreement or "requires" such an interpretation if, and only if, the right the plaintiff claims is created by a labor contract, rather than by a substantive state public law. The Court's subsequent decision in *Rawson, supra,* supports our understanding of *Lingle.* See *Rawson,* 110 S.Ct. at 1909. See also *id.* at 1915 (Kennedy, dissenting).

G. The proponents of the "quantum of contract interpretation" preemption test invoke two policy interests that underlie § 301. Neither supports the "contract interpretation" preemption approach.

1. The first of these interests is uniformity, which the Court in *Lucas Flour* identified as perhaps the most important interest furthered by § 301 preemption, necessary to assure that the negotiation and administration of labor agreements are not hampered by confusion about the consequences of agreeing to a contract term.

But as *Lucas Flour* itself made clear, and precisely for the reasons already given with regard to § 301's basic purpose, the uniformity imposed by § 301 is the uniform application of a single body of *federal labor contract principles* to all *breach of contract claims.* There is no basis in § 301, in the case law, or in reason for extending § 301 preemption beyond the enforcement of *contract rights* to the enforcement of public law rights that implicate a labor contract question, regardless of the context

within which the question arises. *See also Dowd Box v. Courtney,* 368 U.S. 502 1962). So long as federal and state courts as well as arbitrators apply the uniform § 301 federal common law to labor contract question, as *Lucas Flour* requires, there is no danger that the parties will be subject to local and varying law when they seek to enforce their bargain. And such uniformity is all that any contracting party can rationally expect from a uniform system of *contract law.*

2. The second federal interest said to require "quantum of contract interpretation" preemption is a federal preference for arbitral resolution of labor contract claims. There is, of course, a strong policy favoring the arbitration of labor-management disputes, embodied in LMRA § 203(d) and in the *Steelworkers Trilogy.*[11] This presumption does *not,* we submit, have the force to oust state minimum labor standards laws whenever their enforcement arguably requires contract interpretation.

The federal labor policy favoring arbitration covers disputes concerning the majoritarian decisionmaking process embodied in the collective bargaining agreement. LMRA § 203(d), in terms, prefers contractually-established dispute resolution mechanisms as "the desirable method" only "for the settlement of grievance disputes arising over the application and interpretation of an existing collective bargaining agreement", and not for the settlement of public-law based disputes.[12] And, the *Steelworkers Trilogy* as well stressed that the policy favoring arbitration

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[11] *Steelworkers v. Enterprise Wheel & Carriage Corp.,* 363 U.S. 593, 597 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960).

[12] The language of the Federal Arbitration Act in contrast is considerably broader. That Act covers controversies "arising out of" either the "contract" or the underlying "transaction", as well as any controversy involving "the refusal to perform the whole or any part thereof [of the contract or transaction]." 9 U.S.C. § 2.

> is confined to interpretation and application of the collective bargaining agreement; . . . [The arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. [*Steelworkers v. Enterprise Wheel, supra,* 363 U.S. at 597.]

Thus, many labor arbitrators see public law claims as beyond their ken, and refuse to adjudicate such claims even when asked to do so by the parties. *See Darr v. NLRB*, 801 F.2d 1404 (D.C. Cir. 1986) (arbitrator "saw the NLRB and the courts as ultimately charged with the enforcement of public rights, and arbitrators as responsible for applying labor agreements to determine private rights", and issued an award that he knew to be contrary to the NLRB but that he believed effectuated the intent of the parties). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

The limited scope of the presumption favoring labor arbitration has its roots in the fact that the commitment to arbitrate contained in collective bargaining agreements is made by the group, but is binding upon each of the covered individual employees. *Republic Steel Corp. v. Maddox,* 379 U.S. 335 (1965). This commitment makes eminently good sense where the employment rights being arbitrated are themselves the product of the contract; in effect, the substantive employment right was from its origin combined with a commitment to arbitrate, so that the individual upon whom the right was conferred has no basis for claiming that the substantive right should be enforceable in any other manner or fora. Precisely because of their origin, the contract rights subject to arbitral resolution also are collective rights, and it is accordingly the union, and not the individual, that controls access to the arbitration forum.

But where the collective agreement to arbitrate is understood to reach public law rights not rooted in the contract, quite different considerations come into play, as this Court emphasized in *Alexander v. Gardner-Denver, supra*:

> We are unable to accept the proposition that petitioner waived his cause of action under Title VII [by pursuing an arbitration remedy under the collective agreement.] . . . It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different grounds; it concerns not majoritarian processes but an individual's right to equal employment opportunities . . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. [415 U.S. at 51 (citations omitted)].

The same point was reiterated in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1657 (1992), where the Court concluded that a more sweeping policy in favor of arbitration that applies under the Federal Arbitration Act does *not* apply in the context of labor contract arbitration. The Court distinguished the FAA from the LMRA on the ground that labor arbitration is a collectively bargained system that functions to vindicate "rights under a collective bargaining agreement and [not] individual statutory rights," and in light of "the limited authority and power of labor arbitrators." *Id.* at 1657.

Consequently, while the presumption favoring arbitration of labor contract disputes is a broad one, it is not limitless; that presumption has force with regard to rights that are the fruits of the majoritarian decisionmaking process fostered by the collective bargaining system. It follows from this that when state courts resolve contract questions that arise in the course of considering independent state minimum labor standards law claims, they impinge upon no federal arbitration interest, so long as they apply the federal common law of labor contracts in resolving any ancillary labor contract question that may be implicated by the suit.

Were there any doubt on this point, it should be resolved by consideration of the fact that in analogous situations, it has never even been *suggested* that § 301 dictates arbitral resolution of labor contract questions that arise in the course of resolving claims based upon other public law sources. Thus in cases brought under Title VII, courts, including this Court, have regarded it as beyond question that the court in the course of addressing the Title VII claim is to resolve such labor contract questions as arise. See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63, 83 n.14 (1977) (considering seniority provision in labor agreement in evaluating anti-discrimination claim); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668 n.13 (1987) (interpreting antidiscrimination clause in labor agreement). And in a case that provides the closest of analogies, *Corning Glass Works v. Brennan*, 417 U.S. 188, 209 n.29 (1974), the Court rejected an employer argument that the employer had corrected past violation of the Equal Pay Act, 29 U.S.C. § 206, through negotiation of certain provisions in a collective bargaining agreement, and the Court did so only after reviewing the district court's analysis of the relevant terms of the labor contract. There is once again no suggestion in this analysis that § 301 concerns made such interpretation problematic. See also *Connell Construction Co. v. Plumbers*, 421 U.S. 616, 623, 625 (1975) (interpreting a collective bargaining agreement to determine whether an agreement violated the Clayton Act).

Indeed, in another analogous area where there plainly *is* a federal labor law interest in having one adjudicator and not another decide a question, the Court has concluded that this interest is *not* strong enough to overcome a court's authority to resolve all issues in a case otherwise properly before it. In *San Diego Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court formulated a powerful preemption doctrine that requires all disputes that even arguably involve claims of conduct protected by § 7 or prohibited by § 8 of the Act to be resolved by the National Labor Relations Board. Notwithstanding the

primary jurisdiction of the NLRB to consider unfair labor practice allegations, this Court has ruled consistently that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." *Connell, supra*, 421 U.S. at 626 (considering an antitrust violation). *See also Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *Kaiser Steel v. Mullins*, 455 U.S. 72, 87 (1982). The Court's judgment has been that while the policy that unfair labor practice claims be decided by the Labor Board is important—and, indeed, is normally paramount—that policy has to bow to the policy favoring the rational handling of litigation in a court that has jurisdiction over the claim before it. Nothing suggests that § 301 embodies a stronger form of preemption than that stated in *Garmon*.

Nor can it be that these cases can be distinguished on the ground that they involve federal, rather than state, regulation. That argument was advanced and squarely rejected in *Metropolitan Life, supra*: "Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. *We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from federal standards.*" 471 U.S. at 755 (emphasis added).

Finally, even if all of this were not so, and there *was* a federal interest in having all questions concerning a labor contract with an arbitration clause wherever the question arises resolved by an arbitrator, and that interest was stronger than the interest in having the NLRB resolve questions under the NLRA, to protect that interest by *abolishing* state law public rights whenever their resolution implicates a labor contract question is the most unreasonable of all imaginable results.

In all other situations in which it is imperative that a second forum decide a question that arises in the course adjudicating a case properly before the first forum, a doctrine of deferral or abstention has been developed, whereby the first forum holds the claim in abeyance while the

preferred forum considers the ancillary question.[13] Thus under the NLRA, the NLRB will in appropriate circumstances defer to labor arbitration, always with the understanding that deferral "is merely . . . a postponement of the use of the Board's process." *United Technologies*, 268 NLRB 557, 560 (1984). *See generally*, *Collyer Insulated Wire*, 192 NLRB 837 (1971). And under the doctrine of *Railroad Commissioner v. Pullman*, 312 U.S. 496 (1941), federal courts will at times abstain when presented with questions of state law, with the same understanding: that the doctrine involves only postponement, not loss, of federal jurisdiction. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).[14]

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[13] At least one judge has suggested that deferral might be appropriate in this context. *See Jackson v. Conrail*, 717 F.2d 1045, 1060 (7th Cir. 1983) (dissenting) (proposing deferral rather than the total elimination of the claim because "it would be surprising if compulsory arbitration of contract disputes was intended to wipe out the employee's common law rights other than his right to enforce the very contracts that are subject to the scheme of compulsory arbitration."), cert. denied, 104 S.Ct. 1000 (1984). To our knowledge, no litigant in a state law minimum standard suit has ever even requested deferral. We suspect this is so because in truth, the concerns that have led litigants to allege § 301 preemption have everything to do with its potential to defeat the state law claim altogeher, and little or nothing to do with the concern that contract questions are being decided by judges rather than arbitrators.

If deferral ever were considered, only the contract issue would be an appropriate subject of deferral, since a labor arbitrator generally has no authority to resolve the other issues presented in state law minimum standard cases. *Cf. Hillsborough Tp. v. Cromwell*, 326 U.S. 620, 628 (1946) (abstention inappropriate if there is doubt about the adequacy of a means to determine the state law issue in state court).

[14] Having said that much, we hasten to add that we are skeptical of the need for deferral or abstention in this class of cases. In this case, where no one has suggested that there is a substantial contract interpretation question involved, and where there has been no request by any party to submit the question to arbitration, there is in any event no occasion to consider whether in some instances the benefits of having arbitrators resolve contract questions that arise in the course of resolving noncontractual claims outweigh the cost and delay inherent in any system of deferral. It is enough to note respondent's decision simply to deprive petitioner of a right altogether because its resolution requires contract interpretation—a decision made as well by many federal courts in this context—under the guise of protecting "contract interpretation," makes no sense at all.

H. The sum of the matter is this. The statutory right to receive a paycheck on one's last workday is independent of any contractual right, though to be sure, it is of no effect unless there is a paycheck to give, that is, unless there has been an employment relationship, the employee has earned wages due, and the employer has terminated the employee. The essential point is that the "last paycheck" law does not draw its substance from any labor contract; the right is a public law right and has full force and effect whether the parties have negotiated such a rule or not. The fact that the right is stated in general terms and there may be disputes about the details of its application that call for reference to the understandings that govern the employment relationship does *not* make that public law right a private contract right. The state law here, moreover, is *not* one that creates an enhanced penalty for the employer's violation of a collective bargaining agreement; indeed nothing in the record below suggests that the labor contract has been violated or even that the employee claimed that there had been any such breach. The California wage law is thus an example of the most common and venerable state minimum standard law, a law of a kind that the states were enacting long before the passage of the National Labor Relations Act, and that has heretofore always been understood to have survived the enactment of the National Labor Relations Act and the Labor Management Relations Act.

II. SECTION 229 AS APPLIED BY THE LABOR COMMISSIONER IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Respondent incorrectly understood federal law to require California to exclude most unionized workers from the protections of its wage laws. The ultimate question presented in this case is whether such state action which

discriminates against the beneficiaries of the federal scheme of collective bargaining is contrary to federal law.

A. While it is not wholly distinct, this question does not fit squarely within any of the well-developed doctrines of federal labor preemption. This case is not in the class of cases involving the exclusive primary jurisdiction of the NLRB to resolve unfair labor practice charges. *San Diego Building and Construction Trades v. Garmon*, 359 U.S. 236 (1959). Neither is it precisely in the class of cases that take their name from *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976), *viz.*, the class covering the state regulation of conduct that was meant to be unregulated because left "to be controlled by the free play of economic forces," although it bears important similarities to the *Machinist's* class of cases. It is not in that class because, as we have just seen, the area of minimum labor standards regulation is not a "no law" area, but an area in which federal law leaves the states free to regulate.

Analysis must then begin with the first principle of preemption, grounded in the Supremacy Clause of the Constitution: that federal law is supreme, and state law that conflicts with or frustrates federal law must give way. *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819). That principle is the acknowledged starting point for all labor law preemption analysis. *See, e.g., Building and Construction Trades Council v. Associated Builders and Contractors*, 113 S.Ct. 1190, 1195 (1993) (citing cases).

Application of that principle requires consideration of whether there is indeed a federal interest burdened by operation of the state law. The easiest case in this regard is a case in which a state has penalized an employee for exercising an individual right explicitly guaranteed by federal law. In *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), for example, the Court had no difficulty in finding Florida's decision to withhold benefits from an employee solely because she filed an unfair labor

practice charge to be an impermissible burden on that federally created right.

The instant case is like *Nash* in that the respondent directly discriminates against individuals covered by labor contracts containing arbitration clauses; it is different in that there is no individual right to be covered by such an agreement, but rather such agreements are the intended consequence of the operation of the collective right to bargain. But that difference is not determinative. For the *Machinists* line of cases protects just such implicit NLRA collective rights—*viz.* the rights of organized employees and of employers not to be subject to state laws that encroach upon the federal scheme's "no law" area. That being so, this case involves the same mode of analysis that animates the *Machinist* line of cases: whether the state law burdens the operation of the federal scheme taken as a whole.

Preemption based upon concerns implied but not expressed in federal law requires a searching scrutiny of the nature of the federal interest. As the Court stressed in *Belknap v. Hale*, 463 U.S. 491 (1983), to overcome the presumptive validity of state law, more is needed than "broad brush assertions" of burdens on federal rights. *Id.* at 501. We nevertheless believe that analysis of the federal interest here can lead to no conclusion other than that this law, like the law in *Machinists*, is a law that is contrary to the federal scheme.

B. The NLRA does not guarantee employees the right to be covered by labor contracts, or indeed, any guarantee of any contractual rights at all. But, as we have stressed, the entire purpose of the Act is to create a *process* through which such agreements may be reached. The state law here in dispute is a law that discriminates against members of a group that have successfully completed the process of collective bargaining provided for by the federal labor laws. It is difficult to imagine a more direct burden on the federal scheme. As the Court noted in *Metropolitan Life*, "It would turn the policy that animated the Wagner Act on its head to understand it to

have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." 471 U.S. at 756.

C. We hasten to add that the states should, in enacting their laws, take care not to encroach upon areas of exclusive federal concern. But such laws must be based upon *reasonable* concerns about encroaching on the federal scheme, and must in every instance be judged as well by the effect the regulation has on federally protected rights.[15] Here, where the concern about § 301 preemption is fundamentally misconceived, and where the effect of that misconception is to burden directly the operation of the federal collective bargaining law, respondent is in no position to argue that its misundedstanding of the federal law justifies the burdens it has placed on collective bargaining. Whatever power respondent has to write exclusions into its laws in reliance upon the "penumbra" cast by the preemptive force of the federal labor law does not justify excluding unionized workers from the most basic and longstanding minimum standard laws that orbit well outside of that half-light.

By the same token, the states may make accommodations to collective bargaining in their minimum standards laws. In *Fort Halifax Packing Co. v. Coyne*, 479 U.S. 1052 (1987), for example, the Court considered a statute that allows all employers, including unionized employers, to bargain for an alternative to a state minimum standard law. The Court rejected an argument that the law was

[15] Thus in *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), a municipality argued that its refusal to renew the license of a business engaged in a labor dispute was grounded on a desire to remain neutral in that dispute, a desire the municipality believed to be in conformity with federal labor law. Los Angeles further argued that to judge such a position to be itself preempted by federal labor law was to place the municipality in a "no win situation," since whatever action it took it would "stand accused" of aiding one side or the other in the dispute. *Id.* at 619. The Court, finding this argument to be based on a misunderstanding of the relevant federal interests, dismissed it out of hand. *Id.*

preempted as it applied to unionized employers. It found, to the contrary, the opt out "strengthens the case that the statute works no intrusion on collective bargaining [because it] balance[s] the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment." 482 U.S. at 22.[16]

The courts have just begun to consider preemption challenges raised in relation to state minimum standard laws that distinguish between unionized and nonunionized workplaces. We doubt that in this case of first impression it will be possible or prudent to devise a rule intended to be responsive to every possible permutation that may arise. This is especially so when the governing principle requires a careful parsing of the interests involved in each case. As in other preemption cases, then, "[t]his penumbral area can be rendered progressively clear only by the course of litigation." *Weber v. Anheuser-Busch*, 348 U.S. 468, 480-481 (1955).

For present purposes it is enough to note that as applied, Cal. Code § 229 has not been and cannot be defended on this or any other similar ground. The provision does *not* allow unionized workers collectively to decide to opt out of California's wage laws in preference to some other collectively bargained arrangement; it simply excludes them, thereby putting them to a Hobson's choice whereby bargaining for a labor contract with an arbitration clause costs them a substantive public law protection that otherwise is vouchsafed to all other employees as a matter of right. Nor does the state provision further a state interest that parallels a federal labor law interest by increasing the security or well being of workers in some manner;

[16] By a parity of reasoning, a nuanced state law that allows unionized workers collectively to opt out of a state minimum standard law if they bargain for similar but not necessarily identical protections, *compare Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993), raises different concerns than those raised here. On analysis a court might conclude that such a law facilitates collective bargaining rather than punishes its exercise.

instead it bluntly discriminates against those who have successfully completed the bargaining process created and encouraged by federal law. Whatever may be said in defense of other laws designed to accommodate the state and federal schemes, this law should be preempted.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,

Petitioner,

—v.—

LLOYD AUBRY, CALIFORNIA LABOR COMMISSIONER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EMPLOYERS GROUP, ALLIANCE OF MOTION PICTURE & TELEVISION PRODUCERS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC. AND CALIFORNIA ASSOCIATION OF EMPLOYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

The interests implicated by this case far transcend whether union-represented employees in California can pursue late wage payment penalties through the offices of the Labor Commissioner. Labor standards in at least 17 other States and the District of Columbia provide collective bargaining exceptions whose validity have now been called into question.

Amici, who submit this brief pursuant to the written consent of the parties lodged with the Clerk on February 18, 1994, are employer organizations and individual employers with significant connections to California. They represent a cross-section of employers, both in size and by industry, which have longstanding collective bargaining relationships. Many of these employers also operate in states other than California which provide similar collective bargaining exceptions to their own labor standards.

The Employers Group, formerly known as the Merchants & Manufacturers Association, is the largest association of California employers with over 5,000 employer members which employ an aggregate of more than 2,500,000 California employees.

The Alliance of Motion Picture & Television Producers is the employer association which acts on behalf of the major motion picture studios and numerous independent motion picture production companies with respect to collective bargaining and other labor relations activities.

Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. are national television networks with substantial operations in California and throughout the nation.

The California Association of Employers is an association of approximately 800 small and medium-size California employers which participates in collective bargaining on behalf of its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he interest in protecting individuals against exploitation must often be balanced against the value of allowing individuals to order their own affairs. This balance is often struck by conferring rights upon individuals, and then allowing those individuals to make the choice whether they would rather retain, or give up for something else, the right so granted. . . . The 'express contract' exclusion in the Maine Statute does not burden the collective bargaining process . . . [B]y allowing employers and employees to construct a form of protection different from that prescribed by the state, the Statute functions in much the same way as the 'backdrop of state law' against which collective bargaining occurs; viz, the Statute confers certain rights upon one party to the federal bargaining process -- in this instance, employees rather than employers -- but then allows the employer and the union to go forward with only the constraint that any waiver of the state-conferred rights must be express and intentional. . . . [T]his is how the federal bargaining process interacts with such state-conferred rights as the employers' right to manage its property (and with the individual rights conferred by the NLRA itself. (*see, e.g., Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693 (1983))."

Surprisingly, the author of this statement is Livadas' supporting *amicus*, the AFL-CIO, speaking through the same attorneys who successfully argued this position to the Court in *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21-22 (1987).[1] In just a few years, there has been a dramatic change. State "hands off" policies not reasonably distinguishable from those extolled by the AFL-CIO in *Fort Halifax* are now excoriated as "blatant" "anti-union

[1] *See* Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Appellees, submitted in *Fort Halifax Packing Co. v. Coyne*, No. 86-341, pp. 28-30.

discrimination." The attack is not only made by Livadas and the AFL-CIO, but even more surprisingly, also by the United States.

This, indeed, is a strange case, both procedurally and substantively. Extremely significant economic interests of unionized employers throughout the country have been placed into jeopardy by virtue of Livadas' legal challenge to collective bargaining agreement ("CBA") exceptions contained in a large number of State labor laws. Yet, no employer is party to this litigation. The burden of defending the validity of collective bargaining exceptions to State labor regulatory provisions, upon which the employers justifiably have relied, has fallen on the shoulders of a State official whose primary day-to-day activities entails the enforcement of State laws against employers. Ironically, while the State official argues that federal labor policy favors collective bargaining and does not invalidate the many exceptions to State labor regulations that have the purpose of giving full effect to the collective bargaining process,[2] Livadas and the United States -- and to a slightly lesser extent, the AFL-CIO -- argue for a ruling which, if adopted, could severely constrict the scope of collective bargaining.

The essential question in this case is whether California law, as interpreted and applied by the Labor Commissioner, improperly interferes with the federal statutory rights of union-represented employees. The issue is *not* whether the Labor Commissioner correctly interpreted California law -- an issue which cannot

[2] Livadas claims that the Labor Commissioner made a relevant concession of law. [Livadas Brief, p. 10.] *Amici* do not agree with this assessment as a matter of fact and, furthermore, do not believe that any such concession could have the legal effect Livadas seems to urge. (We also note that the alleged concession was in response to an inaccurate statement of labor law presented by the Solicitor General and the Acting General Counsel of the NLRB, *see* pp. 7-12 below.) The mere possibility that employer interests in this case could in any way be impacted by a purported concession by the Labor Commissioner only underscores our concerns about the unusual nature of this case.

appropriately be determined in this type of federal proceeding -- or whether the Labor Commissioner's long-standing "hands off" posture is mandated by federal Section 301 preemption doctrine -- a secondary argument suggested by the Labor Commissioner which the Ninth Circuit did not need to reach, and did not decide.

Without even addressing the fact that State collective bargaining exceptions reflect the legally-presumed strength and prestige of labor organizations, Livadas and her *amici* assert that there has been "discrimination." Nowhere in their briefs can one find any explanation as to *why* or *how* differential treatment in according union-represented employees the right to make their own choices interferes with their rights under the National Labor Relations Act ("NLRA"). And no legal authorities are cited to support the contention that "disparate treatment" between union-represented and non-represented employees in the granting of economic benefits -- by either an employer or the State -- unlawfully interferes with the exercise of employee NLRA Section 7 rights.

The briefs filed by Livadas and her supporters fail to disclose that during the past 50 years, unbroken lines of decisions of the National Labor Relations Board ("NLRB") and at least six Circuits have *rejected* the very position they so strenuously urge. No less than 30 cases have held that employers may engage in "disparate treatment" by unilaterally granting economic benefits to non-represented employees which union-represented groups are required to seek through bargaining. The contention that analogous differential treatment by the State violates the NLRA stands on even weaker legal footing.

Furthermore, the NLRA itself allows for a functionally identical standard for differentiating between union-represented and non-represented employees. Many fundamental individual rights under the NLRA may be "waived" by bargaining representatives, but not by individual, non-represented employees. This also is true of a number of other federal statutes. Given this analogous "disparate

treatment" authorized by the NLRA and the other federal statutes, there is no basis for Livadas and her *amici* to argue, or the Court to conclude, that the NLRA implicitly prohibits the States from allowing or requiring employers and unions -- but not employers and individual employees -- to negotiate with respect to State labor standards.

ARGUMENT

Livadas' and her supporting *amicus* briefs address at length a non-issue in this case -- whether the California "hands off" policy giving rise to this suit was *required* by federal preemption doctrine. Instead, the issue in this case *is* whether the "hands off" policy *contravenes* federal law.[3]

Livadas and the United States correctly state that the Labor Commissioner's *interpretation* of California law is subject to challenge irrespective of the fact that they apparently concede that the interpreted statute is valid on its face. The critical issue, however, as Livadas herself acknowledges, is whether that interpretation of State law -- or "misinterpretation" as she would prefer to characterize it -- "*cause[d] a deprivation of federal rights.*" [Livadas Brief, p. 33.]

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[3] The California Labor Code Section 229 "hands off" policy giving rise to this suit is mandated as a matter of State law irrespective of what limitations federal law might additionally supply. *Plumbing, Heating etc. Council v. Howard*, 53 Cal.App.3d 828, 833-34 n. 1, 126 Cal.Rptr. 406 (1975). Livadas and her supporters argue that the Labor Commissioner has discriminatorily denied her "prosecutorial services." This is not precisely accurate. The "hands off" policy, as the Labor Commissioner demonstrates, is based upon a judgment that claims, such as Livadas', are invalid and/or unenforceable as a matter of California law. The result in this case is the same whether the "minimum labor standard" at issue is Section 229 (as the Labor Commissioner contends) or Labor Code Section 201 and/or 203 (as Livadas contends). Regardless, *amici* dispute that any of these provisions is truly a "minimum labor standard."

For purposes of this case, it is entirely irrelevant whether the Labor Commissioner correctly interpreted California law.[4]

Although the district court decision and Ninth Circuit dissent relied on the "*Machinists* preemption doctrine," the AFL-CIO opines, the United States essentially acknowledges and even Livadas now suggests that *Machinists* principles are not implicated by this case. [AFL-CIO Brief, p. 26; United States Brief, p. 15 n. 4; Livadas Brief, p. 13.] The approach which comes closest to properly focusing the argument is to ask whether it is an unlawful direct infringement of NLRA Section 7 rights for the States to extend labor standards to non-union-represented employees, but not to represented employees who work under CBAs with grievance and arbitration procedures.[5] [*See* United States Brief, pp. 13-15.]

A more accurate way of looking at the same issue, however, is to ask whether it is unlawful for the States to permit employers and unions to reach contract terms varying otherwise applicable labor regulatory standards, while denying the same negotiating flexibility to employers and their non-represented employees.

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[4] Although the Court is not called upon to determine whether the Labor Commissioner's interpretation of California law is correct, *amici* note a prior California judicial decision to similar effect. *See Hagin v. Pacific Gas & Electric Co.*, 152 Cal.App.2d 93, 98, 312 P.2d 356 (1957) (suit for penalty under § 203 barred because it was dependent on interpretation of CBA with arbitration clause).

[5] As the Court explained again just last term, *Machinists* deals with situations where the States attempt to regulate in areas which federal labor policy has mandated be left unregulated by both state and federal regulators. *Building & Construction Trades Council v. Associated Builders and Contractors*, 113 S.Ct. 1190, 1195 (1993). In this case Livadas complains about California's non-regulation in an area which she claims it should be regulating. In any event, the "*Machinists*" theory adds nothing to the analysis because Livadas relies entirely on the notion that the State's interpretation of State law unlawfully infringed upon her Section 7 rights. [*See also* p. 12 n. 16 below.]

The answers to these questions are easy. There is *no* federal restriction on the power of the States to remit labor standards issues to the collective bargaining process. The denial of negotiating flexibility to non-union-represented employees and their employers cannot be turned into claims of anti-union discrimination.

I. 50 YEARS OF NLRA PRECEDENT ESTABLISHES THAT IT IS LAWFUL TO GRANT ECONOMIC BENEFITS ONLY TO NON-UNION-REPRESENTED EMPLOYEES

A most surprising aspect of this case is the *totally unsubstantiated* nature of Livadas and her supporters' crucial, often-repeated assertion that it is unlawful discrimination under the NLRA to extend economic benefits to non-represented employees, but to withhold those benefits from their union-represented colleagues. Livadas and her supporters cite more than 150 cases in their briefs, *none of which is even claimed to support this assertion.*[6] A straightforward legal analysis establishes that just the opposite is true.

A. At Least 30 Cases Have Held That Employer Differentiation Between Union-Represented and Non-Represented Employees Does Not Interfere With NLRA § 7 Rights

The linchpin of the preemption attack in this case is *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), a case prominently cited by Livadas and her *amici*. The critical factor in *Nash* for finding State action to constitute a direct interference with employee NLRA Section 7 rights was that analogous employer

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[6] The dissenting opinion in the Ninth Circuit, which is frequently quoted by Livadas and her supporters, similarly cited *no* basis for the conclusion that "[t]reated employees who are covered by a CBA in a different -- and less favorable -- manner than all other employees is clearly discrimination based on an exercise of protected federal rights." [Pet.App. 17a.] The district court's conclusion similarly lacked analysis to support this key proposition.

conduct unquestionably would have been proscribed by Section 8 of the NLRA, 29 U.S.C. § 158.[7] *Id.* at 238-39. Given this precedent and the otherwise clearly logical connection, we would have assumed that Livadas and her supporters would have focused on the extensive Section 8(a)(1) and (3) jurisprudence governing employer interference with employee Section 7 rights and employer discrimination affecting union activities.[8] Their briefs, however, are totally silent.[9]

As collected in Addendum A, at least 30 Court of Appeals and NLRB decisions have focused on this highly germane issue. These decisions uniformly have held that the infringements upon the exercise of Section 7 rights which result when an employer discriminates in the granting of economic benefits between union *members* and *non-members*, or between *strikers* and *non-strikers*, simply do not exist when an employer differentiates between bargaining units, including differentiation between a group of *union-*

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[7] *Nash* focused on Section 8(a)(4), 29 U.S.C. § 158 (a)(4).

[8] Section 8(a)(1) is a general provision which prohibits an employer to "interfere with, restrain, or coerce employees in the exercise" of their § 7 rights. Section 8(a)(3) prohibits "discrimination . . . to encourage or discourage membership in any labor organization." "[I]t also makes unlawful discrimination against employees who participate in concerted activities protected by § 7. . ." *Metropolitan Edison Co. v. N.L.R.B., supra*, 460 U.S. at 703.

[9] The United States, at least momentarily, addressed the relevant issue in its *Certiorari* Petition Brief, p. 10, when it declared that there was "no doubt" that an "employer could not deny an employee a benefit to which she was otherwise entitled simply because she was covered by a collective bargaining agreement. A state cannot do so either." This reference to analogous employer conduct was not mentioned in the subsequently-filed United States Brief.

represented employees and an *unrepresented* work force.[10] This is true whether the union-represented employees are working under an existing CBA, between agreements, or indeed, if the union and employer have yet to enter into their first CBA.

The most comprehensive legal analysis of this issue is contained in *Meredith Corp.*, 194 NLRB 588, 590-92 (1971). In that case, the Board held that an employer did not violate Section 8(a)(1) or (3) by paying non-union-represented employees for work time lost due to a storm closure, but refusing to grant similar benefits to represented employees working under a current CBA. Citing significant prior precedent and *dicta* from cases finding separate types of violations, the Board held that "[w]hile differentiation among employees 'based on "membership" in a union' is a *per se* violation of Section 8(a)(3), 'differentiation . . . based on membership in a unit' may be entirely legal." 194 NLRB at 591.[11]

In so ruling, the Board in *Meredith* found prior decisions of the Court to be readily distinguishable, including: *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), which held that an employer violated Section 8(a)(1) and (3), irrespective of the lack of showing of anti-union animus, when it refused to pay striking employees

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[10] Aside from these 30 cases which hold the employers may grant or maintain disparate benefits, there are innumerable cases reflecting that employers may advise their employees that this is a potential consequence of collective bargaining. *See e.g., Shaw's Supermarkets, Inc. v. N.L.R.B.*, 884 F.2d 34 (1st Cir. 1989) (collecting cases); *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753, 759 (9th Cir. 1967). Indeed, Livadas so acknowledges. *See Clark Equipment Co.*, 278 NLRB 498, 499-500 (1986), cited in Livadas Brief, p. 14 n. 5.

[11] The differentiation may be unlawful only if there is actual proof of anti-union motivation. It is also possible that there could be distinct legal violations related to the differential treatment such as a refusal to bargain in good faith or the leaving of the impression that there would not be bargaining at all.

accrued vacation benefits which it provided to non-strikers; and *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 45-48 (1954), which held that an employer violated those provisions when it differentiated between union *members* and *non-members* within the same unit in the granting of retroactive wage increases and vacation payments.[12]

A leading court decision on this issue is *Intermountain Equipment Co. v. N.L.R.B.*, 239 F.2d 480 (9th Cir. 1956), where during the life of a CBA, an employer denied union-represented employees sick leave and bonuses it extended to its non-represented work force. The Ninth Circuit distinguished *Radio Officers'* on the grounds that the union-represented employees "had obtained substantial benefits which had not accrued to the non-union employees who were not covered by the contract, and the non-union employees who received the benefits denied union members were outside the scope of the bargaining unit." *Id.* at 482.[13]

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[12] The rule of law determined in *Meredith* has been the NLRB's unwavering rule from at least 1948, *see Shell Oil Co.*, 77 NLRB 1306, 1309-10 (1948) (wage increases), through its most recent reaffirmation in 1990, *see KEZI, Inc.* 300 NLRB 594, 595 (1990) (401(k) plan). Other particularly significant NLRB decisions include *Speidel Corp.*, 120 NLRB 733, 734-38 (1958) (Easter bonuses); *B.F. Goodrich Co.*, 195 NLRB 914, 915 (1972) (profit-sharing benefits); *Empire Pacific Industries, Inc.*, 257 NLRB 1425, 1426 (1981) (cost-of-living wage increases); and *Dallas Morning News*, 285 NLRB 807, 808 (1987) (sick pay benefits).

[13] Other relevant court decisions include: *N.L.R.B. v. Appalachian Electric Power Co.*, 140 F.2d 217, 219 (4th Cir. 1944) (withholding of wage increases); *N.L.R.B. v. Nash-Finch Co.*, 211 F.2d 622, 625-27 (8th Cir. 1954) (discontinued bonuses and insurance benefits); *Firestone Synthetic Fibers Co. v. N.L.R.B.*, 374 F.2d 211, 216-17 (4th Cir. 1967) (non-provided medical and pension plans); *Chevron Oil Co., Standard Oil Co. of Texas v. N.L.R.B.*, 442 F.2d 1067, 1074 (5th Cir. 1971) (withholding of wage increases); *Omaha Typographical Union No. 190 v. N.L.R.B.*, 545 F.2d 1138, 1143-44 (8th Cir. 1976) (not given bonuses); *South Shore Hospital v. N.L.R.B.*, 630 F.2d 40, 45 (1st Cir. 1980), *cert. denied*, 450 U.S. 965 (continued...)

This 50-year line of NLRA cases upon which *amici* rely is explainable either on the ground that (i) differentiation between *represented* and *non-represented* employees has *no* adverse effect on employee rights or (ii) the employer desire to subject employee benefit issues to the bargaining process is a "legitimate and substantial business justification."[14]

The underlying premise advanced by Livadas and her *amici* is not just wrong. It also has absurd ramifications. NLRA discrimination is a two-way street.[15] If union-represented employees

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[13](...continued)
(1981) (withholding of wage increases); *and N.L.R.B. v. Henry Vogt Machine Co.*, 718 F.2d 802, 809 (6th Cir. 1983) (terminated cafeteria privileges).

[14] Under the NLRA, where employer conduct is not "inherently destructive" of Section 7 rights, but rather the effect is "comparatively slight," "an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Great Dane, supra*, 388 U.S. at 34 (emphasis in original). *See also Metropolitan Edison Co., supra*, 460 U.S. at 701; *Amoco Oil Co.*, 285 NLRB 918, 920 (1987) (defining nature of conduct which is "inherently destructive" of employee rights). This test obviously presupposes that there has been at least *some* effect on Section 7 rights. An employer bears no burden under *Great Dane* until the NLRB General Counsel has met a "prima facie burden of proving at least some adverse effect of the benefit denial on employee rights." *Texaco, Inc.*, 285 NLRB 241, 245 (1987); *Amoco Oil Co., supra*, 285 NLRB at 919. The *Great Dane* framework is applicable to claims under both Section 8(a)(1) and (3) *See Texaco, supra*, 285 NLRB at 245 n. 20.

[15] *See e.g. Radio Officers' Union v. N.L.R.B., supra*, 347 U.S. 17, 45-48 (illegal discrimination against non-union-members where employer paid union-members more favorably); *Pattern Makers' League v. N.L.R.B.*, 473 U.S. 95, 100-101 (1985) (bargaining unit employees have a Section 7 right to refrain from union-activities, including strikes); *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 436-37 (1989) ("NLRA protect[s] an employee's right to choose not to strike").

can successfully complain that employers are precluded from granting non-represented employees more favorable economic benefits, the obverse proposition would be equally indisputable: *An employer would not be permitted to grant union-represented employees more favorable economic benefits in collective bargaining unless it automatically extended the same benefits to its non-represented work force*. Livadas and her *amici* cannot possibly be advocating this result.

B. The States Have Even Greater Latitude than Employers to Draw the Types of Distinctions Which Underlie Regulatory "Hands Off" Policies

If, as established, an employer does not unlawfully interfere with employee Section 7 rights by differentiating between union-represented and non-represented employees, there is no conceivable argument that similar State legislative classifications are unlawful.[16]

To the contrary, States may lawfully make distinctions in this area even where comparable differential treatment by employers might be violative of the NLRA. *See Lyng v. International Union, United Automobile etc. Workers*, 485 U.S. 360 (1988) (federal denial

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[16] Given the extensive, relevant Section 8 jurisprudence with respect to employer and union interference with Section 7 rights, see *Nash v. Florida Industrial Commission, supra*, 389 U.S. at 238-39 & pp. 7-8 above, it would be particularly inappropriate to formulate new restrictive rules to be imposed upon the States based on the unions' newly-proposed, vague concept as to whether "the state law burdens the operation of the federal scheme taken as a whole." AFL-CIO Brief, p.27. *See also Building & Construction Trades Council, supra* 113 S.Ct. at 1198 (Court would not infer NLRA restriction on State conduct "where analogous private conduct would be permitted"); *Karahalios v. National Federation of Federal Employees Local 1263*, 489 U.S. 527, 533 (1989) (it is an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies). The main issue here, as Livadas and the United States point out, is whether the State has interfered with Section 7 rights.

of food stamps to strikers' households violates neither First Amendment nor Equal Protection principles even though statute "works at least some discrimination against strikers and their households"). One reason for so concluding is that the State's actions do not even potentially implicitly convey anti-union retaliation or sentiment in the way that analogous employer conduct might.

A clear purpose of State collective bargaining exceptions to "minimum labor standards" -- if any need be demonstrated -- is the wholly legitimate one of encouraging collective bargaining and, thus, allowing union-represented groups of employees to choose their own bargaining priorities. This is frequently the basis underlying permissible employer differentiation. *See e.g., Firestone Synthetic Fibers Co. v. N.L.R.B.*, 374 F.2d 211, 216-17 (4th Cir. 1967); *Intermountain Equipment Co. v. N.L.R.B., supra*, 239 F.2d 480, 482-83; *N.L.R.B. v. Nash-Finch Co.*, 211 F.2d 622, 625-27 (8th Cir. 1954). *See also Dallas Morning News*, 285 NLRB 807, 808 (1987) ("union simply valued other benefits more highly and traded off its sick-pay proposals for benefits in other areas"). It is lawful for a State to do the same.

It is entirely puzzling, indeed, to see how it could be an infringement of an employee's right to engage in collective activity for the State to remit economic issues, such as the one implicated here, to the collective bargaining process. Livadas says she wanted to bargain -- California told her union to seek what she wanted through the bargaining process.

Livadas and her *amici* incorrectly argue that the Section 229 exception *precludes* the pursuit of bargaining alternatives and confined her to the "Hobson's choice" between abandoning union-adherence or forever foregoing late wage payment penalties. This is incorrect.

There clearly are several ways Livadas' union could have negotiated for provisions which would have avoided this "dilemma."[17]

First, the union could have sought comparable (or even more exacting) provisions requiring immediate delivery of final paychecks and penalties for a failure to comply; such provisions would have been enforceable under the existing arbitration procedure. Second, her union could have proposed a contractual provision expressly conferring the right to enforce all or certain types of wage claims through the Labor Commissioner's procedures. *See e.g. Waters v. San Dimas Ready Mix Concrete*, 222 Cal.App.2d 380, 383, 35 Cal.Rptr. 215 (1963) (CBA gave option to employee to pursue claim either through arbitration or the Labor Commissioner). Third, to the extent that the existing procedure did not encompass claims of this sort, Livadas' union could have sought to modify the arbitration clause to include claims for statutory late wage payment penalties. *See e.g. Int. Bhd. of Teamsters, Local Union No. 117 v. Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977) (rejecting as "frivolous" an employer's contention that an arbitrator lacked power to apply a wage penalty statute where the employer and union had agreed to arbitrate the statutory claim).[18]

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[17] It is especially strange that Livadas now totally ignores such alternatives given her concession in the Petition for *Certiorari*, p. 8, that her union could have "bargain[ed] to replace the lost statutory benefits."

[18] For present purposes, it suffices to establish, as we have, that there is no California or federal law restriction on the power of unions and employers to agree to arbitrate California statutory wage claims. For this reason, there is no need to determine the extent, if any, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), survives *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See e.g., Hirras v. Nat. R.R. Passenger Corp.*, 10 F.3d 1142 (5th Cir. 1994) (Title VII claims arbitrable under CBA arbitration clause subject to Railway Labor Act); *Austin v. Owens-Brockway Glass Container, Inc.*, 1994 U.S. Dist. Lexis 846 (W.D.Va. 1994) (ADA claim subject to CBA arbitration procedure). As to the scope of CBA arbitration

(continued...)

Livadas' union evidently did not pursue any of these options and, if it did, it chose to accept other wages and benefits in lieu of these. That is the very nature of collective bargaining. State law exemptions, of which Livadas and her *amici* complain, allow for flexibility so that unions and employers may order their priorities to best fit their specific industry, business and employee needs.

Instead of anticipating the issue and dealing with it in a timely fashion through the bargaining process, Livadas turned to the federal courts claiming "discrimination." This position is misguided.

Section 229 was not designed to punish employees for choosing to be represented by unions, nor does it convey the remotest implication of any state disapproval of the collective bargaining process. To the contrary, "[a] primary aim of the California Legislature in adopting section 229 was to recognize the importance of both collective bargaining agreements and arbitration." *Plumbing, Heating etc. Council v. Howard, supra*, 53 Cal.App.3d 828, 833.

Livadas' attack and the arguments of her *amici* also are at fundamental odds with *Fort Halifax*, a case involving a state-imposed requirement for the payment of severance pay which authorized employers to negotiate less favorable severance pay terms. The statutory exemption in *Fort Halifax* was found to "strengthen the case that the statute works no intrusion on collective bargaining." 482 U.S. at 22. Adopting the *amicus* argument urged by the AFL-CIO, the Court determined that it was wholly appropriate for the State to "balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment." *Id.*

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[18](...continued)
clauses, *see also, e.g., Dryer v. Los Angeles Rams*, 40 Cal.3d 406, 418 n. 12, 220 Cal.Rptr. 807, 709 P.2d 826 (1985) (state law tort claims fall within scope of CBA arbitration clause); *Papadopolous v. Sheraton Park Hotel*, 410 F.Supp. 217 (D.D.C. 1976) (claims under D.C. Wage Law arbitrable under CBA).

The conclusion that there has been no infringement of Section 7 rights becomes even easier when one focuses on the precise issue raised by this case -- whether the State's differential treatment, which protects individual non-represented employees by not allowing them to negotiate less favorable labor standards with their employers, is unlawful discrimination against union-represented employees. Any hint of anti-union discrimination which could be perceived by employees when employers treat non-represented employees economically more favorably than their union-represented counterparts does not conceivably come into play when the State draws distinctions, such as it did in Labor Code Section 229, to protect the "individual, non-union and otherwise unprotected wage earner . . ." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 131 (1973).

Thus, whether or not analogous employer conduct would be unlawful (which it is not), CBA exceptions, such as these adopted by California and many sister States, unquestionably are lawful. This is true whether they broadly distinguish between non-union represented and represented employees or they limit the exemption to subgroups among the represented, such as employees covered by CBAs with or without arbitration procedures and/or specified substantive conditions.[19] Such legislative classifications are clearly permissible where, as here, the union-represented employees automatically receive the State labor standard unless and until they enter into a CBA which

[19] Invoking the so-called "sex plus" theory of employment discrimination under Title VII, *see Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the United States argues that the Labor Commissioner's exclusion of only a subclass of the "protected group" is as illegal as exclusion of the entire class. [United States Brief, p. 23.] This argument is entirely irrelevant in light of our showing that it would have been perfectly lawful for the State to have expressly excluded all CBA-covered employees (or, indeed, all union-represented employees) directly from the substantive scope of Sections 201 and 203. (We also note that Title VII rulings have little bearing with respect to NLRA jurisprudence.)

does not provide the benefit. Classifications would be equally valid even if employees do not receive the benefit unless and until it is bargained for and obtained.

C. The AFL-CIO Position is Based Upon Erroneous Assumptions and Invalid Legal Arguments

Given these conclusions, there can be no possible validity to the fence-straddling position taken by the AFL-CIO. In what appears at first glance to be a presentation of remarkable candor, the AFL-CIO suggests that *some* State collective bargaining exceptions might be held to "facilitate[] collective bargaining rather than punish[], its exercise." [AFL-CIO Brief, p. 29 n. 16.]

Although *amici* appreciate the concession as far as it goes, we still take exception to the balance of the AFL-CIO's position. The AFL-CIO's suggestion that California's "hands off" policy in this case is illegal because it "simply excludes" union-represented employees, rather than permits them "to opt out of California's wage laws in preference to some other collectively bargained arrangement," AFL-CIO Brief, p. 29, is not even based on a correct factual premise. California law, like the Maine statute considered in *Fort Halifax*, extends State law substantive and procedural rights which remain applicable unless and until the employees enter into a CBA which in one way or the other varies or eliminates those rights.[20] Livadas and similarly situated employees have multiple bargaining options,

[20] Even more difficult to accept is the AFL-CIO's additional suggestion that unions may be permitted to bargain away rights only when "they bargain for similar but not necessarily identical provisions." [AFL-CIO Brief, p. 29 n. 16.] In its *Fort Halifax* brief, the AFL-CIO contemplated that unions could "give up" state law rights "for something else," just as they may entirely "waive" employee individual statutory rights under the NLRA. [*See* p. 2 & n. 1 above.] It cannot be disputed that unions may entirely waive economic benefits and NLRA statutory rights. [*See* pp. 23-25 below & Addendum A, pp. A-4--A-5.] Indeed, certain other federal statutes contemplate the possibility of a complete waiver of benefits. [*See* pp. 25-27 below.]

including negotiating for a "Labor Commissioner" exception to an arbitration clause. [*See* p. 14 above.]

In any event, even if no bargaining alternative were available to permit union-represented employees to secure enforcement of State law rights by the Labor Commissioner, there still would be no basis for complaint. Unions would still be perfectly able to negotiate with employers for identical substantive and remedial rights. The burden on the union of starting with no guaranteed rights and having to secure the rights through bargaining -- even though such rights are afforded to the non-union-represented -- is functionally indistinguishable from the many cases in which similar employer impositions were held to be totally compatible with Sections 7 and 8 of the NLRA. [*See* Addendum A, pp. A-1--A-4.]

D. The Only Case Which Even Arguably Supports Livadas' Position is Distinguishable, Erroneous and Contrary to Prior Precedent Within the Same Circuit

In support of the *certiorari* petition, Livadas and the United States vigorously contended that their position as to the alleged illegality of California's "hands off" policy was supported by the Eighth Circuit decision in *United Steelworkers v. Johnson*, 830 F.2d 924 (1987) *(en banc)* and the Fourth Circuit decision in *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148 (1992). *Certiorari* having been granted, they no longer rely on these cases.[21] And, for good reason. These decisions have nothing whatsoever to do with the essential issue in this case.[22]

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[21] The United States now relies upon *Johnson* and *Rum Creek Coal* only for the distinct proposition -- with which *amici* do not disagree -- that a statute valid on its face is susceptible to being interpreted and applied in a manner contrary to federal law. [United States Brief, pp. 24-25.]

[22] The discrimination which the Eighth Circuit majority in *Johnson* found to have been committed by the State of South Dakota was disparate treatment (continued...)

The only decision which is of any potential assistance to Livadas and her *amici* was not cited in any of their briefs. *McCollum v. Roberts*, 1994 U.S.App. Lexis 3537 (9th Cir. 1994), held that a CBA exception to an Oregon labor standard requiring paid rest periods was an illegal infringement of union-represented employees' NLRA rights and therefore was preempted under the "*Machinists* preemption doctrine."

McCollum aptly observed that the conclusion that "Oregon was not required to exempt union employees from benefits does not ineluctably mean that Oregon's voluntary choice to do so was unlawful." The Ninth Circuit panel further opined that "[i]f Oregon's exclusion of unionized employees serves some other legitimate State function, then an argument can be made that its regulations could be justified." *McCollum*, however, struck down the CBA exception on the ground that the defendant Oregon Labor Commissioner had "proffered no reason for the exclusion" other than an "incorrect assumption" that it was required by federal preemption principles.

McCollum is readily distinguishable on the ground that the California exemptions are based upon unquestionably valid state considerations of promoting collective bargaining and allowing for employee self-determination, interests fully legitimized by the Court

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[22](...continued)
between union *members* and *non-members* who were part of the same bargaining unit. 830 F.2d at 929. This is precisely the type of discrimination which was condemned as highly destructive of Section 7 rights by the Court in *Radio Officers' Union* and was distinguished in the many cases collected in the Addendum. The lack of any conflict between this case and *Johnson* is more than amply confirmed by the Eight Circuit's decision in *Omaha Typographical Union No. 190 v. N.L.R.B.*, 545 F.2d 1138, 1144 (8th Cir. 1976), which distinguished the Court's decision in *Great Dane* in holding that the "[d]isparate treatment of members of different units provides no inference of discrimination." *Rum Creek Coal* is even more remote. It had nothing to do with any alleged interference with employee Section 7 rights.

in *Fort Halifax* in accepting the AFL-CIO's *amicus* argument. *See also* pp. 13-17 above. The disparate effect of these statutory exceptions is not the result of discrimination against union-represented employees, but rather is the result of a legitimate legislative judgment to protect individual, unrepresented and legally perceived weaker employees. *Ware, supra*, 414 U.S. at 131.

But even more fundamentally, *McCollum* is wrong.[23] It provided no basis for its legal conclusion -- other than to approvingly cite the Ninth Circuit dissent in the present case -- as to how or why Oregon's distinguishing between non-represented and represented employees could be illegal under the NLRA.[24] As demonstrated above, 50 years of NLRA precedent establishes that there was negligible, if any, adverse affect on employee Section 7 rights.[25]

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[23] *McCollum* distinguished the Ninth Circuit's decision in *Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (1993), on the purported ground that the State in *Babler* "had a proprietary interest in enforcing working conditions on its own construction projects." A reading of *Babler*, however, shows that the "proprietary interest" rationale was in no way related to its Sections 7 and 8 analysis. 995 F.2d at 914-15. Furthermore, *amici* seriously doubt that the "proprietary interest" rationale of *Building & Construction Trades Council, supra*, 113 S.Ct. 1190, extends to permitting otherwise proscribed discrimination by the State against individual employees. Thus, *McCollum* probably is irreconcilable with *Babler*. *See also Christoffel v. E.F. Hutton & Co., Inc.*, 588 F.2d 665, 667 (9th Cir. 1978) (Ninth Circuit panels are bound by earlier panel decisions).

[24] The *McCollum* panel relied on "*Machinists* preemption," an approach correctly disavowed by the AFL-CIO and the United States. [See p. 6 above.]

[25] *Amici* further believe that contrary to *McCollum*, but consistent with the Ninth Circuit majority in this case, a State's attempt to avoid potential federal preemption of overregulation activity is a legitimizing basis for a CBA exception irrespective of how well the State divines federal preemption requirements. *See e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. (continued...)

II. THE NLRA AND OTHER FEDERAL STATUTES PERMIT UNIONS, BUT NOT INDIVIDUALS, TO BARGAIN AWAY INDIVIDUAL EMPLOYEE STATUTORY RIGHTS

Fort Halifax leaves no doubt that a State *may* impose a minimum labor standard and, at the same time, allow for employer-employee negotiation for lesser terms. The issues of whether or not a particular standard is "waivable" and, if so, the conditions for "waiver" are, in the first instance, issues of State law.[26] Many

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[25](...continued)
327, 335-36 (1987) (religious employer exemption to Title VII was based on valid legislative purpose of avoiding potential unconstitutional overregulation). At the very least, the State must be allowed "reasonable" breathing room. *See* AFL-CIO Brief, p. 28; *Texaco, Inc., supra*, 285 NLRB 241, 246 (claim of discrimination against employer will be rejected if employer's position was based on "reasonable" and "arguably correct" contract interpretation). And in determining the "reasonableness" of California's 1959 legislative judgment, it would be inappropriate to rely on the Court's *subsequent* decision in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), in light of the Court's acknowledgement that there was "plausibility" to the preemption argument which it rejected, based on "dicta in some prior Court decisions." *Id.* 752-53. Also, it should be noted that the State's analysis in this case focused upon Section 203, the statutory remedy provision. *See Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 510 (1984) ("a sanction for noncompliance with an otherwise valid state regulation must, for preemption purposes, be assessed independently in terms of its potential conflict with the federal enactment"). Everything else said, *amici* also believe that application of Sections 201 and/or 203 in fact would have been preempted -- an issue which need not, and should not be decided in this case.

[26] In *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409 n.9 (1988), the Court noted that it is an open question whether State law bars to waiver are subject to Section 301 preemption. That question obviously need not be addressed in this case.

provisions, as noted at pp. 28-30 below, contain express, unambiguous conditions for "waiver."[27] In other situations, ambiguous statutory "waiver" language has been subject to interpretation. *See, e.g., Porter v. Quillin,* 123 Cal.App.3d 869, 876, 177 Cal.Rptr. 45 (1981) (state policy favoring collective bargaining supports conclusion that union may vary labor standard). "Waiver" may be permitted even when the relevant statute itself is wholly silent. *See, e.g., American Broadcasting Companies, Inc.*, 61 N.Y.2d 244, 461 N.E.2d 856, 473 N.Y.S.2d 370 (1984) (upholding CBA waiver of state law meal break requirement).

In this case, there can be no dispute as to the propriety of "waiver" as a matter of California law, the nature of the State law conditions for "waiver" and the fact that these conditions were found by the Labor Commissioner to have been satisfied. The only issue before the Court is whether the State's "waiver" conditions illegally discriminate against union-represented employees by permitting them to "waive" the labor standards, but not granting analogous rights to non-represented employees. The answer, as already demonstrated, is that "disparate treatment" designed to protect legally presumed powerless, non-represented employees cannot be transmuted into claims of anti-union discrimination.

There are other reasons for reaching the same conclusion. It is settled that a federal labor preemption challenge to an aspect of State law generally will not succeed if the NLRA and other federal statutes have similar legal effect or otherwise implicitly authorize the challenged State action. *See, e.g., Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 755 (1985); *Brown v. Hotel &*

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[27] *See also Fort Halifax, supra*, 482 U.S. at 4 n.1 (statute provided exception if "the employee is covered by an express contract providing for severance pay"). It was this State law standard to which the AFL-CIO referred in its *Fort Halifax* brief. [*See* p. 2 above.] The AFL-CIO interpreted it to provide that any waiver "must be express and intentional."

Restaurant Employees, 468 U.S. 491, 505-509 (1984). Because the NLRA and other federal statutes provide for the exact type of differential treatment of which Livadas and her *amici* complain, all other considerations aside, Livadas' claim has no possible merit.

A. The NLRA Waiver Doctrine Authorizes the Differential Treatment of Which Livadas Complains

As the AFL-CIO argued in *Fort Halifax*, *see* p. 2 above, but now overlooks, the NLRA "waiver" doctrine is an extremely relevant analogue to State laws which provide that employees may negotiate away "minimum labor standards." Most recently approved by the Court in *Metropolitan Edison Co. v. N.L.R.B., supra*, 460 U.S. 693, this rule provides that unions, but not individual employees (whether or not union-represented), may waive their constituents' individual statutorily-protected rights, including economic rights, as part of the bargaining process. *See also, e.g., Northern Pacific Sealcoating*, 309 NLRB 759 (1992) ("parties to collective bargaining agreements may waive certain of their rights, including some fundamental statutory rights").

This rule of flexibility, among other things, allows a union to "bargain away" statutory protections "to secure gains it considers of more value to its members." 460 U.S. at 707. To our knowledge, it has *never* even been argued that this rule constitutes "anti-union" discrimination simply because individual, non-union-represented employees do not enjoy the same negotiating flexibility.

Of particular significance to our analysis are the decisions which confirm that unions may waive individual employee rights under the NLRA to receive economic benefits on a non-discriminatory basis. "Waiver of an employee's statutorily protected right to receive benefits free of discrimination imposes no constraints on the employee's ability to choose a representative. It is directly analogous to a union's bargaining away its member's economic rights." *Energy Cooperative, Inc.*, 290 NLRB 635, 636 (1988). *Accord, e.g. Gulf Oil Co.*, 290 NLRB 1158, 1161 (1988). Also highly germane are the

decisions which uphold the power of unions to bargain away the right of access of their members to the NLRB's processes with respect to the vindication of fundamental NLRA rights. *See Plumbers and Pipefitters Local U. No. 520 v. N.L.R.B.*, 955 F.2d 744, 751-52, 756 (D.C. Cir.), *cert. denied*, 113 S.Ct. 61 (1992); *Mahon v. N.L.R.B.*, 808 F.2d 1342, 1345 (9th Cir. 1987). *See also, e.g., Northern Pacific Sealcoating, supra*, 309 NLRB 759, 760 (unions and employers may contractually forego access to Board's representational rights machinery).[28]

It is entirely irrelevant whether the State's conditions for "waiver" correspond to the "clear and unmistakable" waiver standard which governs the NLRA "waiver" analysis.[29] *Metropolitan Edison*

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[28] There is a distinct line of decisions in which the NLRB provides for "deferral" of its own proceedings pending arbitration pursuant to collectively-bargained procedures. *See Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984) ("*Collyer*" deferral applies to claimed violations of individual employee rights). *Accord, N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822, 838-39 (1984); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974); *Hammontree v. N.L.R.B.*, 925 F.2d 1486 (D.C. Cir. 1991) (*en banc*). Although the California policy at issue in this case is not strictly a "deferral" policy, the *Collyer* doctrine does provide further indicia that the NLRA permits states to adopt "hands off" policies applicable only with respect to employees who work under collective bargaining agreements with grievance and arbitration procedures. It is not "anti-union discrimination" for the States to decline to extend the same "hands off" enforcement policies to claims brought by individual, non-union-represented employees.

[29] In fact, the State's waiver conditions would easily satisfy the federal standard. To constitute a "waiver" under federal law, there is no need to demonstrate that the matter was expressly discussed between employer and union or even that union fully understood the consequences of its actions. *See e.g. American Freight System, Inc. v. N.L.R.B.*, 722 F.2d 828, 832 (D.C. Cir. 1983) (any statutory right under NLRA to refuse to work based on safety concerns was "waived" simply by the existence of a contrary provision in the CBA); *Northern Pacific Sealcoating, supra*, 309 NLRB 759 (continued...)

Co., supra, 460 U.S. at 708. What is relevant is that the NLRA authorizes the same type of "disparate treatment" with respect to unions bargaining away employee rights -- both substantive economic rights and the opportunity to pursue claims through public administrative agencies -- which Livadas and her *amici* decry as "anti-union discrimination" on the part of the State of California.

B. Other Federal Employment Statutes Authorize Similar Differential Treatment

There are a number of federal statutes which contain exceptions analogous to the challenged State CBA exceptions. When these other federal statutes are read in conjunction with the NLRA "waiver" cases, there can be no lingering argument as to the validity of the State CBA exceptions.

Fair Labor Standards Act: The federal minimum wage and overtime law -- a paradigm example of a "minimal employment standard" -- provides in several places that federal standards may be varied downward, or eliminated entirely, by employer-employee agreement, including employer-union agreement. Section 7(b)(1) & (2), 29 U.S.C. § 207(b)(1) and (2), for example, wholly exempt

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[29](...continued)
(waiver may be effected "by contractual provision or by conduct"); *Gem City Ready Mix Co.*, 270 NLRB 1260 & 1261 (1984) (waivers of rights "need not . . . be evidenced by an express statement of waiver;" "a waiver of what constitutes a legally protected right is not invalidated on the basis that the waiving party . . . may not have realized that the right waived was otherwise protected by the Act"); *Gulf Oil Co., supra*, 290 NLRB 1158, 1161 ("clear and unmistakable" waiver of NLRA discrimination claims found, in part, because agreement provided that it was to "settle all matters negotiated between the parties"). *See also Chicago Tribune Co. v. N.L.R.B.*, 974 F.2d 933, 936-37 (7th Cir. 1992); *Dept. of Navy, Marine Corp Logistics Base*, 962 F.2d 48, 60 (D.C. Cir. 1992). Furthermore, "[j]ust as ignorance of the law does not excuse conduct which violates it, ignorance of the law does not revoke conduct which legitimizes what might *otherwise* violate the law." *Gem City, supra*, 270 NLRB 1260 (emphasis in original).

employers from weekly overtime obligations in certain circumstances applicable *only* when employees are employed "in pursuance of an agreement, made as a result of collective bargaining . . ." Similarly, under the Portal-to-Portal Act amendments, 29 U.S.C. § 203(o), certain time otherwise treated as work time under the FLSA is non-compensable if so provided by a CBA.[30]

Service Contract Act: This statute mandates that employers furnishing services to the United States provide wages and fringe benefits in accordance with "prevailing rate" determinations made by the Secretary of Labor, but permits the employers to pay lesser wages and fringe benefits, or no benefits at all, "where a collective bargaining agreement covers any such service employees." 41 U.S.C. § 351(a)(1) & (2).

Employee Retirement Income Security Act: The ERISA anti-discrimination provisions governing tax qualification considerations exclude employees covered by collective bargaining agreements "if there is evidence that retirement benefits were the subject of good faith bargaining."[31] 26 U.S.C. § 410(b)(3)(A). *See Lynn-Edwards Corp.*, 290 NLRB 202, 204 & n.14 (1988) (in finding that retirement plan with somewhat similar exclusion did not violate § 8(a)(1) of the

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[30] Section 7(o), 29 U.S.C. § 207(o), is also similar, although not quite as directly analogous. *See Moreau v. Klevenhagen*, 113 S.Ct. 1905 (1993) (overtime pay of public employees may be replaced with "comp time" pursuant to employer-employee agreement; where employees have an authorized bargaining representative, only the union -- and not individual employees -- has the power to contract away the right to overtime wages). Section 7(f), 29 U.S.C. § 207(f) permits exceptions to weekly overtime pay obligations which come into play either based on individual agreements with non-represented employees or collective agreements with union-represented employees.

[31] Of course, benefits would be deemed to have been the subject of bargaining if the union decided to forego or "waive" its right to bargain. *See e.g., Firestone Synthetic Fibers Co. v. N.L.R.B., supra* 374 F.2d 211, 216-17 (union never requested inclusion in pension plan).

NLRA, the Board "note[d] the similarity" between the plan and 26 U.S.C. § 410(b)(3)(A)).[32] Provisions comparable to § 410 include 26 U.S.C. §§ 401(i), 416(i)(4), 419A(e)(1) & 505(a)(2).

Sherman Antitrust Act: Pursuant to the non-statutory labor antitrust exemption, union-represented employees are denied antitrust protections with respect to employer control of wages, hours and working conditions which are extended to non-union-represented individuals. *See, e.g., Powell v. National Football League*, 930 F.2d 1293, 1302-03 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) ("the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws").

III. LIVADAS' ARGUMENT THREATENS NUMEROUS OTHER COLLECTIVE BARGAINING EXCEPTIONS TO STATE LABOR REGULATIONS

As the prior discussion suggests, the importance of this case far transcends the specific dispute in question. If Livadas successfully argues that the State cannot take a "hands off" policy with respect to her claim for late final paycheck penalties, far greater consequences could follow. *Amici* wish to advise the Court of the many laws in California and throughout the nation which may be affected. We also note that the wide prevalence of these regulatory exceptions further negates any implication of governmental anti-union discrimination.

A. California Provides a Number of Express Collective Bargaining Exceptions to State Labor Standards

Extremely important examples of collective bargaining exceptions to state labor standards -- with many millions of dollars

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[32] The specific employee benefit plan at issue in *Lynn-Edwards* provided that union-represented employees would be excluded only if there had been bargaining *and* the CBA granted alternative retirement benefits. This latter limitation was not one imposed by § 410(b)(3)(A).

potentially at stake -- can be found in the administrative orders of a California agency, the Industrial Welfare Commission ("IWC"), which specify requirements for payment of daily overtime penalties. For example, employers in the broadcasting and motion picture industries have significantly relied on provisions which allow them to enter into CBAs which do not require payment of double time for work in excess of twelve hours in a day, as the IWC orders otherwise would require.[33]

Similarly, Calif. Labor Code § 227.3 provides that all unused vested vacation time must be paid to terminated employees and has been judicially interpreted rather stringently to require employers to pay prorated vacation pay for employees irrespective of vesting requirements. These rules, however, are subject to the important qualification: "*Unless otherwise provided by a collective bargaining agreement . . .*" (emphasis added).

Express CBA exceptions likewise are provided to statutes which specify the frequency of wage payments, Labor Code §§ 204, 204.1 & 204.2, and of work hours and rest days, § 504.

B. At Least 17 Other States and the District of Columbia Provide Similar Exceptions

California is not unique in remitting some labor standards issues to the collective bargaining process. As enumerated in

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[33] IWC Wage Orders 11-80 and 12-80, applicable to the broadcasting and motion picture industries respectively, provide exceptions to the overtime requirements for "any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee at not less than one dollar ($1.00) more than the minimum wage." *See* Title 8, Calif. Code of Reg. § 11110(3)(F) (broadcasting) & § 11120(3)(H) (motion picture). (The overtime obligations appear in § 11110(3)(A) & § 11120(3)(A).) Similar provisions apply with respect to the other businesses covered by the IWC orders (which constitute almost all California private sector employers).

Addendum B, we have identified examples of collective bargaining exceptions in the laws of more than one-third of the States.[34]

Several States provide CBA exceptions with respect to provisions specifying the time for making wage payments, including payments to terminated employees. *See, e.g.*, D.C. Code Ann. § 36-103(1) (exception to requirement of paying terminated employee within one working day following termination); Okla. Stat. tit. 40, § 165.3 (wage payment upon termination); Or. Rev. Stat. § 652.140 (payments upon termination); Vt. Stat. Ann. tit. 21, 342(b) (timing of weekly wage payments).

As other important examples, States other than California provide CBA exceptions to state overtime requirements: *See, e.g.*, Alaska Stat. § 23.1060(d)(14) (exception to overtime provisions for employees under flexible work hour plans in a CBA); Nev. Rev. Stat. § 608.018(2)(f) (overtime pay); Or. Rev. Stat. § 279.334 (daily overtime pay for employees of contractors on public projects).[35]

Meal and rest break provisions also frequently are subject to CBA exceptions: *See, e.g.*, Conn. Gen. Stat. § 31-51ii (CBA exception to required 30-minute meal break for 7-1/2 hour work day); Illinois C.S. 140/3 (meal breaks); Mass. Gen. L. ch. 149, § 101 (meal breaks); Minn. Stat. §§ 177.253 & 177.254 (meal and rest breaks); Or. Admin. R. 839-20-100(1) (meal and rest periods and other working conditions).[36]

Finally, at least two States provide CBA exceptions with respect to mandated insurance provisions similar to those upheld in

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[34] *Amici* do not represent this listing to be exhaustive.

[35] § 279.334 is the provision correctly upheld by the Ninth Circuit in *Babler, supra*, 995 F.2d 911. *See* p. 20 n. 23 above.

[36] Rule 839-20-100(1) is the provision incorrectly struck down by the Ninth Circuit in *McCollum, supra*, 1994 U.S.App. Lexis 3537. *See* pp. 19-20 above.

Metropolitan Life, supra, 471 U.S. 724. *See* Wash. Rev. Code §§ 48.44.310 & 48.44.340 (required coverage of chiropractic and mental health care); Md. Ann. Code art. 48A, § 490L (reimbursements and copayments for prescriptions).

If CBA exceptions in California and elsewhere were ineffective, there could be substantial, unanticipated costs to many employers, which costs might have been alleviated through the negotiation of different arrangements in other aspects of the CBAs. Considerations of fairness aside, we have established that these CBA exceptions are designed to enhance, and not to interfere with, the collective bargaining process. They do not constitute anti-union discrimination.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM A

NLRA Decisions Holding that Differential Treatment Between Union-Represented and Non-Union Represented Employee Groups Was Not Unlawful

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NLRA Decisions Holding that Differential Treatment Between Union-Represented and Non-Union Represented Employee Groups Was Not Unlawful

I. New Benefit Extended to Non-Bargaining Unit Employees, but not Extended to the Union-Represented Group

A. During Life of Existing CBA

Intermountain Equipment Co. v. N.L.R.B., 239 F.2d 480, 482-83 (9th Cir. 1956) (employer did not violate § 8(a)(3) where it granted sick leave and bonuses only to non-represented employees, particularly given that union-represented employees had bargained for and obtained other benefits which the non-unit employees were not given).

Hemet Casting Co., 260 NLRB 437, 443 (1982) (no violation of § 8(a)(1) where employer granted new fringe benefits to non-represented employees, but not to bargaining unit employees).

Empire Pacific Industries, Inc., 257 NLRB 1425, 1426 (1981) (no violation of § 8(a)(1) & (3) where employer granted cost-of-living wage increases only to non-represented employees).

Sun Oil Co. of Penn., 245 NLRB 59, 66-67 (1979) (no § 8(a)(1) or (3) violation where employer selectively granted severance pay; employer may "hold the line and preserve for tactical reasons benefits or concessions in advance of collective bargaining").

Bancroft-Whitney Co. Inc., 214 NLRB 57, 61 (1974) (no § 8(a)(3) violation where employer granted wage dividends only to non-represented employees).

Sundstrand Castings Co., 209 NLRB 414, 427 (1974) (not illegal discrimination for employer to "grant [severance] benefits to unorganized employees and withhold the same benefits from organized employees").

B.F. Goodrich Co., 195 NLRB 914, 915 (1972) (no § 8(a)(3) violation because "the granting of new profit-sharing benefits to unorganized employees but not to represented employees is not, standing alone, prohibited discrimination").

Meredith Corp., 194 NLRB 588, 590-93 (1971) (employer did not violate § 8(a)(1) or (3) by paying only non-represented employees for time not worked due to snow storm closure).

New Orleans Bd. of Trade, 152 NLRB 1258, 1264-65 (1965) (no § 8(a)(1) violation where employer gave bonus to non-represented employees, but withheld bonus from union-represented group).

Central States Petroleum Union, 127 NLRB 223, 228-29 (1960) (no § 8(a)(3) violation where members of different bargaining units were treated differently for purposes of layoff and recall).

Speidel Corp., 120 NLRB 733, 734-38 (1958) (no violation of § 8(a)(1) and (3) where employer "disparate treatment" consisted of giving Easter bonus to non-represented employees which it did not pay to union-represented employees).

Anheuser-Busch, Inc., 112 NLRB 686, 690-91 (1955) (no § 8(a)(1) or (3) violation where employer granted pay for day not worked to members of one bargaining unit, but not to another; no inference of unlawful intent can "be drawn from the disparity of treatment alone").

B. Before First CBA or Between CBAs

South Shore Hospital v. N.L.R.B., 630 F.2d 40, 45 (1st Cir. 1980) ("As the Board points out, absent unlawful motive, an employer, during the course of negotiations, does not violate the Act by withholding wage increases from represented employees") (*dictum*).

Omaha Typographical Union No. 190 v. N.L.R.B., 545 F.2d 1138, 1143-44 (8th Cir. 1976) (no § 8(a)(1) violation where bonuses were paid to non-unit employees who worked during strike, but were withheld both to striking and non-striking members of the bargaining unit; "[d]isparate treatment of members of different units provides no inference of discrimination").

Chevron Oil Co., Standard Oil Co. of Texas v. N.L.R.B., 442 F.2d 1067, 1074 (5th Cir. 1971) (employer did not violate § 8(a)(1) or (3) because "[i]t has long been an established [NLRB] principle that . . . an employer is privileged to withhold from organized employees wage increases granted to unorganized employees or to condition their grant upon final contract settlement").

N.L.R.B. v. Appalachian Electric Power Co., 140 F.2d 217, 219 (4th Cir. 1944) (no § 8(a)(1) violation where employer withheld wage increases from union-represented group on ground that the "terms and extent of these increases would necessarily depend upon the outcome of the subsequent collective bargaining").

Harvard Folding Box Co., Inc., 273 NLRB 841, 851-52 (1984) (no § 8(a)(1) or (3) violation where employer continued to pay the full amount of insurance premiums for its non-unit employees while requiring unit employees to pay part of those premiums).

Winn-Dixie Raleigh, Inc., 267 NLRB 231, 236 (1983) (not a violation of § 8(a)(3) where employer granted annual wage increase only to non-represented employees).

United States Postal Service, 261 NLRB 505, 506-507, 511 (1982) (no § 8(a)(3) violation where employer granted wage increase only to its non-represented employees because, "[o]nce the Union was certified, the [employees] could not expect to receive all those random increases while the Union was also bargaining with [the employer] over a new contract").

Ithaca Journal-News, Inc., 259 NLRB 394, 396 (1981) (not a violation of § 8(a)(1) & (3) where employer granted increase in mileage allowances to only non-union-represented employees).

Shell Oil Co., 77 NLRB 1306, 1309-10 (1948) (no § 8(a)(1) or (3) violation because "an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain through a statutory representative").

II. Pre-Existing Benefit Reduced, Eliminated, or Not Included in CBA

N.L.R.B. v. Henry Vogt Machine Co., 718 F.2d 802, 809 (6th Cir. 1983) (no violation of § 8(a)(1) where employer withdrew company-subsidized lunchroom privileges from employees who joined bargaining unit).

Firestone Synthetic Fibers Co. v. N.L.R.B., 374 F.2d 211, 216-17 (4th Cir. 1967) (no § 8(a)(1) violation where employer's benefit plans distinguished between union-represented and non-represented employees, the record showing that "the Union never requested the major medical and pension plans available to unrepresented salaried employees be made available to unionized hourly-paid employees, choosing instead to bargain for other benefits").

N.L.R.B. v. Nash-Finch Co., 211 F.2d 622, 625-27 (8th Cir. 1954) (not a violation of § 8(a)(1) & (3) where employer did not continue to pay bonus and insurance benefits after entering into CBA which did not require it to do so, even though non-unit employees

continued to receive the economic benefits and union never expressly waived the benefits).

KEZI, Inc., 300 NLRB 594, 595 (1990) (no § 8(a)(1) violation where 401(K) plan excluded "employees who are members of a collective bargaining unit with whom retirement benefits were the subject of good-faith bargaining").

Lynn-Edwards Corp., 290 NLRB 202, 203-04 & n. 14 (1988) (employer did not violate § 8(a)(1) by maintaining ESOP retirement plan which excluded employees covered by collective bargaining agreement).

Dallas Morning News, 285 NLRB 807, 808-09 (1987) (no § 8(a)(1) violation where non-represented employees had had sick pay plan for a number of years, but union-represented group did not; record showed that "the Union simply valued other benefits more highly and traded off its sick-pay proposals for benefits in other areas").

Handleman Co., 283 NLRB 451, 452 (1987) (not a violation of § 8(a)(1) for employer to maintain ESOP plan which excluded employees covered under any company collective bargaining agreements unless such agreement specifically provided for coverage under the plan).

Sarah Neuman Nursing Home, 270 NLRB 663, 680-81 (1984) (employer did not violate § 8(a)(1) by maintaining profit sharing plan which excluded "any person who is covered under a collective bargaining agreement . . . unless the collective bargaining agreement provides for the inclusion of such person under the plan").

ADDENDUM B

State Statutes, Other than California's, Providing CBA Exceptions to Labor Standards

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State Statutes, Other than California's, Providing CBA Exceptions to Labor Standards

I. CBA Exceptions to Provisions Specifying the Time in which Employer Must Pay Wages or Benefits

A. Timing of Payments to Employees Upon Termination or Resignation

District of Columbia: Employer must pay discharged employee's earned but unpaid wages not later than the working day following the discharge, unless another time is specified in a CBA between the employer and the employee's union. D.C. Code Ann. § 36-103(1).

Employer must pay earned but unpaid wages of an employee who quits or resigns by the next regular pay day, or within seven (7) days from the date of resignation, whichever is earlier. This provision does not apply if another time is specified in the CBA. D.C. Code Ann. § 36-103(2).

Oklahoma: Employer must pay all earned but unpaid wages of an employee who is terminated or resigns at the next regular pay day. This provision does not apply if contrary provisions in a CBA cover the employee. 40 Okl. Stat. tit. 40, § 165.3.

Oregon: Where employment is terminated, all wages earned and unpaid at the time of the discharge become due and payable immediately. This provision is inapplicable where a CBA otherwise provides for payment of wages upon termination. Or. Rev. Stat. § 652.140.

B. Timing of Other Payments

District of Columbia: An employer must pay wages to employees on designated pay days. No more than ten working days may elapse between the end of the pay period covered by the payment and the designated pay day, except where a different period is specified in the CBA. D.C. Code Ann. § 36-103(1).

Vermont: In most cases, an employer must pay wages weekly. Each weekly wage payment must relate to a day not more than six (6) days prior to the date of payment. However, if a collective bargaining agreement so provides, each payment may relate to a day not more than thirteen (13) days prior to the date of payment. Vt. Stat. Ann. tit. 21, § 342(b).

II. CBA Exceptions to Provisions for Maximum Hours or Overtime Pay

Alaska: Overtime premium pay requirements for work in excess of 40 hours per week or 8 hours per day do not apply to work performed by employees under flexible work hour plans which are part of a CBA. Alaska Stat. § 23.10.060(d)(14).

Montana: A period of eight (8) hours constitutes a day's work in all works and undertakings carried on by employees of any municipal or county government. However, this provision does not apply to firefighters working under a work period established by a CBA. Mont. Code Ann. § 39-4-107.

Overtime compensation requirements do not apply to firefighters working under a work period established in a CBA. Mont. Code Ann. § 39-3-406(2)(s).

Nevada: Employees covered by a CBA that provides other rules for overtime pay are not subject to overtime premium pay requirements for work in excess of 40 hours per week or 8 hours per day. Nev. Rev. Stat. § 608.018(2)(f).

Oregon: Rules regarding maximum hours and overtime premium pay for employees in mills, factories, and manufacturing establishments do not apply to employees who are subject to a CBA which otherwise provides limits on required hours of work and overtime payments. Or. Rev. Stat. § 652.020(4).

Rules regarding overtime premium pay under public contracts for hours worked in excess of 40 per week or 8 per day and for work performed on Saturday and legal holidays do not apply to contracts for public improvements where the contractor-employer is a party to a CBA. Or. Rev. Stat. § 279.334.

Rules promulgated by Labor Commissioner pursuant to his authority to prescribe minimum wages and overtime pay do not apply to individuals employed by the state or political subdivisions thereof if a CBA prescribes rules governing these conditions if employment. Or. Rev. Stat. § 653.261.

III. CBA Exceptions to Provisions Specifying Requirements or Meal or Rest Breaks

Connecticut: Employees must be given a meal break of at least thirty (30) consecutive minutes where the employee works at least 7-1/2 consecutive hours. However, this rule does not alter or impair any contrary provisions in a CBA in effect on July 1, 1990. Conn. Gen. Stat. § 31-51ii.

Illinois: Employees must be given a meal break of at least twenty (20) minutes, beginning no later than five (5) hours after the start of work, where the employee is scheduled to work for 7-1/2 or more continuous hours. However, this requirement does not apply to employees whose meal periods are established through the collective bargaining process. Ill. Stat. ch. 820, § 140/3.

Massachusetts: Employees must be given a minimum of 30 minutes for a meal-time interval when the employee is scheduled to work more than six (6) hours a day. However, the state's Labor Commissioner may exempt factories, work shops, or mechanical

establishments from this rule where an exemption is appropriate due to "special circumstances" affecting such establishments, including the existence of a CBA. Mass. Gen. L. ch. 149, § 101.

Minnesota: Employer must permit each employee who is working eight (8) or more hours sufficient time to eat a meal. Furthermore, employees must be given adequate time in each four (4) consecutive work hours to use the nearest convenient rest room. However, these requirements do not prohibit employers and employees from establishing different meal periods or standards for rest breaks pursuant to a CBA. Minn. Stat. §§ 177.253 & 177.254.

Nevada: Employer must allow 30-minute meal period for a work day of eight (8) hours, and must allow paid 10-minute rest breaks for each four (4) hours worked. However, these requirements do not apply to employees included within the provisions of a CBA. Nev. Rev. Stat. § 608.019.

North Dakota: An employee who works with at least one other employee on a shift that exceeds five (5) hours must be given a minimum 30-minute break, except for employees whose breaks are governed by a CBA. N.D. Admin. Code § 46-02-01-02(5).

Oregon: Employees shall receive meal periods of not less than 30 minutes for each work period of six (6) to eight (8) hours. In addition, employees are entitled to rest periods, without deduction of pay, for every four (4) hours worked. These meal and rest periods and other working conditions requirements are inapplicable to employees covered by a CBA. Or. Admin. R. 839-20-100(1).

IV. CBA Exceptions to Mandated Group Health Care Insurance Policy Provisions

Maryland: Employer-provided health care insurance policies may not establish different reimbursement amounts for pharmaceutical products based on the identity, practicing specialty, or occupation of the prescriber. Nor may the policy impose different co-payments based on whether the insured uses a community

pharmacy or a mail order pharmacy. However, these provisions do not apply to insurance policies issued to an employer pursuant to a CBA. Md. Ann. Code art. 48A, § 490L.

Washington: Group health care insurance policies shall offer coverage for chiropractic care and mental health care on the same basis as any other care. However, these requirements do not apply to group policies entered into in accordance with a CBA. Wash. Rev. Code §§ 48.44.310 & 48.44.340.

V. CBA Exceptions to Provisions Requiring Employers to Allow Employees to Inspect Personnel Files

Alaska: An employee or former employee has the right to inspect his or her personnel file, but the employer may impose reasonable rules and limitations. This requirement does not supersede the terms of a CBA. Alaska Stat. § 23.10.430(b).

Illinois: Employers, on advance request, must permit employees to inspect personnel records. An employee may request two inspection opportunities at reasonable intervals during a calendar year, unless otherwise provided in a CBA. Ill. Stat. ch. 820, § 40/2.

Wisconsin: Employee, upon request, must be permitted to inspect personnel documents. The employer must grant at least two requests per calendar year, unless otherwise provided in a CBA. Wis. Stat. Ann. § 103.13(2).

VI. CBA Exceptions to Other Laws

Arkansas: Nothing in subchapter governing minimum wages shall be deemed to interfere with, impede, or in any way diminish right of employees to bargain collectively with their chosen representatives in order to establish wages or other conditions of work. Ark. Code Ann. § 11-4-205.

Illinois: Where an employee with accrued paid vacation time resigns or is terminated, the monetary equivalent of all earned vacation time shall be paid to the employee at his final rate of pay, unless otherwise provided in a CBA. Ill. Stat. ch. 820, § 115/5.

Kentucky: Law establishes maximum work hours and other working conditions for drivers and chauffeurs. However, these provisions do not apply to employees employed by motor carriers who are covered by a CBA. Ky. Rev. Stat. Ann. § 281.730.

Louisiana: City and parish school boards must provide a minimum of 30 minutes daily planning time to elementary school teachers which shall not result in a lengthened school day. However, this provision does not apply to a school board operating under the terms of a CBA. La. Rev. Stat. Ann. § 17:434.

Montana: Employer must, to provide a safe workplace, purchase, furnish, and require the use of various health and safety devices and safeguards, unless the terms of a CBA provide otherwise. Mont. Code Ann. § 50-71-201.

Statutes governing public finance of public works projects require contractors to pay employees the standard prevailing wage rate, unless the contractor has entered into a CBA covering the work to be performed. Mont. Code Ann. §§ 17-5-1526, 17-5-1527, 18-2-403 & 90-7-302.

North Dakota: In addition to employee's right to recover unpaid wages from employer, employee is entitled to recover interest and penalties. However, this provision does not apply to wage claims arising under the contested application of a CBA. N.D. Cent. Code § 34-14-09.1.

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No. 92-1920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KAREN LIVADAS,
Petitioner,
v.
LLOYD AUBRY, LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 86 national and international labor organizations with a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for in the Rules of the Court.

SUMMARY OF ARGUMENT

In Part I of this brief we consider respondent's understanding that it would be inconsistent with federal labor policy to extend the coverage of state wage laws to employees covered by labor agreements with arbitration clauses. We show that this Court has held that protecting

employees in modern industrial society through state minimum labor standard laws is not contrary to, but, instead, the base upon which the federal collective bargaining laws rest. Thus, the states, like the federal government, may establish public law minimum substantive protections for all employees, including employees covered by collective bargaining agreements.

We then demonstrate that no policy inherent in § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, suggests any different result. That provision was intended to assure that agreements secured through collective bargaining would be enforceable through a uniform body of federal law. Nothing in that law, or in this Court's previous decisions that consider its preemptive force, supports the view that the need for uniform enforcement of labor agreements requires the wholesale eradication of state law claims whenever resolution of those claims requires reference to the terms of a labor agreement. Neither the federal policy requiring uniformity in interpreting labor agreements, nor the policy favoring arbitration of workplace disputes under collectively bargained arbitration schemes supports respondent's position.

In Part II we discuss the inverse of the proposition analyzed in Part I: whether a law whose effect is to deprive unionized workers of the benefits of state minimum standards laws—far from being *required* by federal labor policy—so burdens the functioning of the federal scheme as to be in conflict with that scheme. We demonstrate that when a state deprives unionized workers of the benefits of its state minimum labor standards laws on a mistaken view of the incompatibility of the two systems of worker protection, the result of its actions is simply to punish employees who have completed the process of collective bargaining. For that reason, a law like Cal. Code § 229 that as applied effectively deprives most unionized workers the benefit of the state wage laws impermissibly burdens the federal scheme.

ARGUMENT

I. FEDERAL LABOR POLICY DOES NOT REQUIRE STATES TO EXCLUDE UNIONIZED WORKERS FROM THE PROTECTIONS OF THEIR MINIMUM STANDARD EMPLOYMENT LAWS.

California for many years has had in place wage laws that require, among other things, that employees be paid at specified intervals and in a specified manner. Such laws are the norm in state labor codes. Virtually every state has made the judgment that employees, especially employees with limited income, are dependent upon regular wage payments to meet their basic human needs. The resulting statutory provisions are a basic component in our system for regulating employment, a paradigm example of a public law minimum substantive protection for individual employees.[1]

Respondent nevertheless argues that § 301 of the LMRA preempts the application of such state wage laws to employees covered by a collective bargaining agreement with an arbitration clause, because the remedy provided in the law requires in every case calculation of the wage due, which in turn requires "application of a collective bargaining agreement." Pet. App. 26a, citing Cal. Code § 229. Virtually all state wage laws—indeed virtually all state employment laws of any kind that provide the standard remedy of backpay—require a similar calculation. If respondent is correct as to the preemptive scope of LMRA § 301, most state wage laws as applied to unionized workers would be preempted.

The AFL-CIO is the last organization to minimize the benefits of collective bargaining and the efficacy of labor contract arbitration, or to oppose preemption doctrines necessary to ensure the effective operation of the collective bargaining system instituted by the National Labor

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[1] *See* Bureau of National Affairs, Labor Relations Reporter, State Laws, summarizing the regulations of the 48 states that have adopted such provisions.

Relations Act of 1935 ("NLRA"), as amended in 1947 by the LMRA. We nevertheless think it clear that respondent's view of the preemptive force of federal labor law in this area rests upon a fundamental misunderstanding of that law.

A. It facilitates analysis to begin by fixing LMRA § 301's place within the overall NLRA-LMRA statutory scheme of which it is a single piece. These federal enactments protect the right of employees "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7, 29 U.S.C. § 157. Where employees choose to exercise that right by selecting an exclusive bargaining representative, NLRA §§ 8(a)(5), 8(b)(3) & 8(d) require the employer and the employee representative to bargain in good faith over wages and other terms and conditions of employment, and LMRA § 204(a)(i) enjoins the parties to "exert every reasonable effort to make and maintain [collective bargaining] agreements." *See* 29 U.S.C. §§ 158(a)(5), (b)(3), (d) & 174(a)(i).

LMRA § 301, in its turn, dictates that where collective bargaining results in an agreement, that agreement shall be enforceable in the federal courts:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . . [29 U.S.C. § 185(a).]

Moreover, as this Court explained in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985),

> [i]n *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), the Court ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases "is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. That seminal case understood § 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts.

And, in *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962), the Court resolved the "choice of law" question inherent in *Lincoln Mills* by ruling that these federal common law principles must apply in all breach of labor contract cases, whether brought in state or in federal court. Thus the Court declared federal contract law paramount, and state contract law preempted, when courts are presented with labor contract claims.

The federal labor law, then, is an integrated whole that governs the successive stages of a single process enabling employees to unionize, and employers and employees to bargain collectively and reach binding and enforceable agreements embodying the results of their bargain.

B. This is not the first time that this Court has considered how this federal law of collective bargaining was intended to relate to state minimum labor standards laws. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court considered the claim that the NLRA system of free collective bargaining preempts such state laws. In this regard, the appellants argued that Congress "intended to prevent the states from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining position." *Id.* at 751. The *Metropolitan Life* Court unanimously rejected that argument. In so doing, the Court emphasized four propositions critical to the instant case.

First, regulation of the employment relationship, in the form of public law minimum labor standards embodied in countless legislative enactments at both the federal and state levels, dates back a hundred years. Such enactments

include, for example, "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, . . . [s]tate laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payments to employees for time spent at the polls or on jury duty." 471 U.S. at 756 (internal quotations omitted).

Second, both federal and state minimum labor standard laws have governed "union and nonunion employees equally," 471 U.S. at 755, and have done so by establishing public law norms that operate "independent of the collective-bargaining process," and that "devolve on [employees] as individual workers, not as members of a collective organization," *id.* (*quoting Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981)).

Third, Congress "developed the framework for self-organization and collective bargaining of the NLRA within th[is] larger body of state law promoting public health and safety" and did not "intend[] to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." 471 U.S. at 756. Accordingly, Congress conceived of the collective bargaining system as one that enables workers, through collective action, to enhance their employment conditions, above minimum public law standards. "No incompatibility exists, therefore, between federal rules designed to [protect collective bargaining] and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least as long as the purpose of the state legislation is not incompatible with the[] general goals of the NLRA." *Id.* at 754-756. Indeed, Congress has reaffirmed this judgment repeatedly over the years, as Congress "has . . . [n]ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards." *Id.* at 755. And, the Court has

noted that there is "no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards." *Id.*

Finally, the Court noted that the federal collective bargaining scheme would be endangered if individual workers were to be denied state minimum labor standards protections should those workers choose to unionize and engage in collective bargaining: "It would turn the policy that animated the Wagner Act on its head to . . . penalize[] workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employees." 471 U.S. at 756.

C. *Metropolitan Life* settles the proposition that the federal labor laws do *not* preempt state minimum labor standards laws during the organizing process governed by NLRA-LMRA scheme or during the collective bargaining process, also governed by that scheme. The remaining question—and the one presented here—is whether once collective bargaining negotiations result in an agreement, the mechanism for the enforcement of the agreement—LMRA § 301—requires the very same laws to give way. The logic of the situation all but compels the conclusion that the answer is "No."

First, as we have noted, the *Metropolitan Life* Court, after canvassing the NLRA-LMRA legislative materials, concluded that Congress developed the federal labor laws "within the larger body of state law promoting health and safety" and did not by enacting the federal labor laws "intend to disturb the myriad state laws then in existence that set minimum labor standards." 471 U.S. at 756.

Nothing in the LMRA § 301 legislative materials shows a different intent. So far as we can find, there is not a word in § 301 or in the reports and floor statements pertaining to that provision so much as suggesting that the federal law of labor contracts would displace state minimum labor standards laws. That parallel is precisely

what one would expect; § 301, after all, is not a free-standing provision animated by a set of purposes and concerns separate from those that animate the NLRA-LMRA scheme as a whole, but an integral part of that scheme.

Second, LMRA § 301's particular office in the federal labor law is not one that supports, much less requires, the preemption of state minimum labor standards laws. The point of § 301 is to make collective bargaining agreements *enforceable.* The means to that end is a grant of jurisdiction to the federal courts over suits for violation of such agreements, and a charge to develop a *uniform federal labor contract law* to govern such suits.

No principles of law are better settled than that private agreements are negotiated against the background of the applicable public law and that such private agreements are supplemental or subordinate to, not paramount over, public law. *E.g., Mineworkers v. Pennington,* 381 U.S. 657, 665 (1965) (because unions have a right to "bargain does not mean that the agreement reached may disregard other laws"). *See generally,* Restatement (Second) of Contracts, § 178, comment a (a "court is bound to carry out the legislative mandate with respect to the enforceability of [any] contract term"). Indeed, this Court has already ruled that § 301 conforms to these principles: "Clearly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 212 (1985).

Given these principles, and *Metropolitan Life*'s recognition that the federal law governing the negotiation of collective bargaining agreements does *not* preempt state minimum standard laws, it is all but inconceivable that the federal law governing the enforcement of the resulting collective bargaining agreements would have that more far-reaching preemptive effect.[2]

[2] The *Metropolitan Life* Court was well aware of the § 301 preemption issue. That case was decided later in the same term the Court decided the seminal § 301 preemption case, *Allis-Chalmers Mfg. Co. v. Lueck, supra.* Indeed, *Metropolitan Life* cited the *Lueck* decision for the proposition that federal law could not be understood to have sanctioned penalizing workers who choose to join a union by depriving them of the benefits of state minimum labor standard laws. 471 U.S. at 756.

D. Four times in recent years, the Court has confronted the question presented here: when does the § 301 federal common law of labor contracts preclude state causes of action from going forward where the plaintiff is an employee covered by a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck, supra, Electrical Workers v. Hechler,* 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987); *Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399 (1988). *See also Steelworkers v. Rawson,* —— U.S. ——, 110 S.Ct. 1904 (1990). None of these cases, fairly understood, support respondent's view of § 301 preemption.

In *Allis-Chalmers, supra,* the Court for the first time considered the preemptive force of § 301 in a case that was not styled as a suit to enforce a labor agreement. In that case, the plaintiff, an employee covered by a collective bargaining agreement, brought what he labelled a state tort action for breach of the duty of good faith in failing to honor an insurance provision in the agreement. Analyzing the state law, the Court determined that in substance the state tort was nothing more than a breach of contract claim pleaded in tort. Had the matter been pleaded as a breach of contract, the plaintiff would have been required to arbitrate the claim pursuant to the contract's arbitration clause, and—had a breach been established—would have been awarded contractual damages. By pleading the claim as a tort, plaintiff sought to avoid the arbitral process and the limited contract damages that would have otherwise applied.

To have allowed such a result, the Court concluded, "would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their con-

tract claims as claims for tortious breach of contract." 471 U.S. at 211. *See also Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 22-23 (1983). As the *Allis-Chalmers* Court explained, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement must be resolved by reference to uniform federal law." 471 U.S. at 211.

Lest it be misinterpreted as having uncovered some more expansive preemptive intent in § 301, the Court also added:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301. . . . In extending § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract. [471 U.S. at 212.]

This Court's subsequent decisions reiterate the same principle: Section 301 preemption is designed to assure that if the parties to collective bargaining negotiate for certain *contract rights*, and as well negotiate for arbitration of claims arising out of those bargained-for-rights, they will be assured the benefit of their collective bargain through application of a uniform body of federal law. A state law claim, whatever its label, that states in substance that the defendant denied the plaintiff a *contract right*, does nothing more than give force to a private contractual agreement. Such a law is not a law "independent of a labor contract," but in substance a contract law that § 301 preempts.

At the same time, *Allis-Chalmers* and its progeny confirm that nothing in § 301 draws into questions state laws that *are* independent of the labor agreement; *viz.*, laws that grant employees a *public law right* and employers a corresponding public law obligation—whether or not

the employee is covered by a collective bargaining agreement. An employee filing a claim under such a state law makes out his substantive case without having to show that the employer breached a collective bargaining agreement, or any other private agreement. And, such an agreement comes into play only to provide a subsidiary fact (for example, in this wage case, the time at which wages were to be paid or the amount of the wages) or if the employer-defendant so chooses as a defense. Such tangential references to a labor contract cannot be said to change the independent nature of the state minimum labor standards law or of the employee's claim founded on that law. *See, e.g., Hechler*, 481 U.S. at 859 (§ 301 preemption turns upon whether the state law duty relied upon "was one without existence independent of the collective-bargaining agreement"); *Caterpillar*, 482 U.S. at 395 ("a plaintiff covered by a collective bargaining agreement is permitted to assert [in state court] legal rights *independent* of that agreement") (emphasis in original). *See also, Rawson*, 110 S. Ct. at 1911 ("questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law") (citing *Allis-Chalmers*); *id.* at 1915 (Kennedy, J., dissenting) (agreeing that "a State cannot circumvent our decisions in *Lingle*, *Hechler*, and *Allis-Chalmers*, by the mere 'relabeling' as a tort claim an action that in law is based upon the collective bargaining process").

E. To be sure, as the decision below shows, the lower courts have tended to read this Court's § 301 preemption decisions—and most particularly the *Lingle* decision—as standing for a different and broader principle. That principle is that when employees covered by a collective bargaining agreement (or, as in the instant case, an agreement with an arbitration clause) assert a claim based upon what is alleged to be a state minimum labor standards public law right, to determine whether the claim is pre-

empted, the court looks, not to the independence of the state *public law right* asserted from any *labor contract right,* but instead to whether resolution of the claim that rests on the public right entails some specified quantum of contract interpretation. On this theory, if resolution of the employee's minimum labor standards law claim entails more than that quantum of contract interpretation, the claim is preempted, without regard to whether the *public law right* asserted is independent of any contract right, or is instead, in essence, a contract right.

The quantum of contract interpretation said to trigger § 301 preemption varies wildly. In its most modest form, a state minimum labor standards law claim is said to be not preempted unless the validity of the claim turns on the contract interpretation question. At the other extreme, such a claim is said to be preempted whenever a *defendant* asserts as an affirmative defense that there is a contractual justification for its action, regardless of the merits of that defense. In its most modest formulation, then, the same state law claim may be preempted or not depending on the facts that are in dispute in a particular suit brought under the state law. In its strongest form, as in the instant case, § 301 is said to require preemption of state minimum labor standards law claims when a question turning on the labor contract is present even though there is no dispute over the contract's meaning. But in all of its forms, the "quantum of contract interpretation" test looks to whether contract interpretation questions are at least conceivably present in cases brought under the state minimum labor standards law, rather than to whether the state law is a "contract" law, *viz.*, a law concerned with the enforcement of private contract rights.

At the least, these decisions require unionized employees to pursue remedies through labor arbitration under analogous provisions in their collective bargaining agreement. But, as in this case, the doctrine typically has a far greater substantive effect. Labor contracts do not necessarily include provisions that create contract rights analo-

gous to rights provided by state minimum labor standard laws. And, as we discuss in more detail, *infra,* labor contract arbitration is typically limited to resolution of contract claims, and is not intended by the contracting parties to be a vehicle to resolve claims derived from other sources of law.

Thus, as we noted at the outset, in most cases the "quantum of contract interpretation" approach has the practical effect of depriving unionized employees of the protection of a wide variety of substantive state public law rights of general applicability that do *not* derive from any private contractual agreement [3]—*e.g.*, rights of privacy,[4] rights against wrongful discharge,[5] rights against retaliatory discharge,[6] rights against defamation,[7] and, as here, rights derived from wage laws.[8]

The courts of appeals, for example, are now split on whether state intentional infliction of emotional distress claims should be preempted when the alleged invasion took place in a unionized workplace, if the employer

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[3] While by far the greatest danger of "contract interpretation" preemption is that it preempts claims that should not be preempted, we observe as well that the doctrine is also underinclusive. For example, at least one court has found not preempted a state law fraud claim based upon the fraudulent negotiation of a labor agreement, reasoning that it need not interpret the labor agreement to resolve the case under state law. *See Operating Engineers v. Wilson,* 915 F.2d 535 (9th Cir. 1990), *cert. denied,* 112 S.Ct. 3013 (1991).

[4] *Jackson v. Liquid Carbonic Corp.,* 863 F.2d 111 (1st Cir. 1988); *Schlacter-Jones v. General Telephone,* 936 F.2d 435 (9th Cir. 1991); *Strikes v. Chevron USA, Inc.,* 914 F.2d 1265 (9th Cir. 1990); *Utility Workers v. Southern California Edison,* 852 F.2d 1083, 1086-87 (9th Cir. 1988); *Laws v. Calmat,* 852 F.2d 430 (9th Cir. 1988).

[5] *Johnson v. Anheuser Busch, Inc.,* 876 F.2d 620 (8th Cir. 1989).

[6] *Magerer v. John Sexton & Co.,* 912 F.2d 525 (1st Cir. 1990).

[7] *Johnson v. Anseuser Busch, Inc., supra.*

[8] *Pennsylvania Federation of BMWE v. National R.R. Passenger Corp.,* 989 F.2d 112 (3rd Cir. 1993).

defendant asserts as an affirmative defense that its conduct can arguably be justified by the "management rights" clause of the labor agreement. In finding such a claim to be preempted on this rationale, the Fourth Circuit majority in *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531 (1991) (*en banc*), *cert. denied*, 112 S. Ct. 912 (1992), did not feel the need to consider whether the management rights clause did in fact justify the conduct, whether, if the clause did so, the state law protection could in any event be negated through negotiation of such a clause, or whether the state law protection is, in fact, waived. Instead, invocation of the collective bargaining agreement in the defense was, *without more*, enough to deprive unionized workers the protections of Virginia's tort law, on the theory that § 301 mandated such a result.[9]

The litigating elucidation of the "quantum of contract interpretation" standard has served to demonstrate that it is so contrary to normal contract concepts, so devoid of any basis in federal labor policy, and so evanescent in its formulation that it cannot be held in the mind. The lower court decisions relying upon this test have resulted in a set of *ad hoc* decisions that purport to accommodate both the "quantum of contract interpretation" test and an exception for "incidental" contract interpretation that are in hopeless conflict.[10]

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[9] *Accord, Brown & Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1256 (5th Cir. 1990); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990); *Johnson v. Anheuser Busch, Inc., supra*, 876 F.2d 620 (8th Cir. 1989). *Contra, Krashna v. Oliver Realty, Inc.*, 895 F.2d 11 (3rd Cir. 1990); *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989); *Hanks v. General Motors Corp.*, 906 F.2d 341 (8th Cir. 1990). *See also McCormick v. AT&T Technologies*, 934 F.2d at 538 (Phillips J., dissenting).

[10] As the Ninth Circuit has observed, LMRA § 301 preemption has become "one of the most confused areas of federal court litigation:"

> [S]ection 301 has been the precipitate of a series of often contradictory decisions, so much so that "federal preemption of state labor law has been one of the most confused areas of federal court litigation." *Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209 (1989). [*Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991).]

F. We do not believe that this "quantum of contract interpretation" preemption standard is fairly derived from this Court's decisions. As courts applying such a standard typically rely on language from this Court's decision in *Lingle*, we turn to consider the Court's formulation of the § 301 preemption test in that decision.

At the outset, we acknowledge that it is no easy matter to formulate a reasonably succinct rule of law that captures the distinction between a state minimum labor standards law that is independent of a collective bargaining agreement, and a state law that rests on a collective bargaining agreement right. State minimum labor standard laws are typically stated in general terms—that employees shall not work more than a set number of hours, that employees shall not be discriminated against on a stated basis, etc.—while the specifics of the employment relationship are worked out in a set of understandings promulgated unilaterally by the employer in unorganized workplaces, or in a collective bargaining agreement in unionized workplaces. As this case shows, it is all but inevitable that a state minimum labor standards case will require some reference to those concrete understandings. Thus, while the basic distinction here is between "state rules that proscribe conduct or establish rights and obligations independent of a labor contract," *Allis-Chalmers*, 471 U.S. at 212, and state rules that rest on a contract right, the word "independent" cannot mean totally without any relation to any labor contract. Instead, the phrase embodies the concept of a state law that creates a substantive public right that stands on its own, and does not require a claimant in order to prevail to prove a "contract right" or that a defendant-employer breached a contract in any way. As the Court recognized in *Lingle*:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate

> state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . ." [471 U.S. at 413, n.12.]

The Court has therefore essayed a number of formulations of the governing § 301 preemption rule which the *Lingle* opinion collects. The *Lingle* Court thus summarized *Allis-Chalmers* as holding "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute." 486 U.S. at 405-06. And to clarify what kind of "dependence" was at issue, the Court then quoted that portion of the *Allis-Chalmers* decision that analyzed and identified the dependent nature of the state tort claim at issue in that case: "We then analyzed the Wisconsin tort remedy, explaining that it 'exists for a breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself' " 486 U.S. at 405 (*quoting Allis-Chalmers*, 471 U.S. at 216, *quoting in turn* Wisconsin law).

In a footnote to that passage, *Hechler, supra,* was said to have "applied this same principle of § 301 pre-emption and to have resulted in a judgment that a Florida law was preempted because it was contract based. "Our analysis of Florida law revealed that '[t]he threshold inquiry for determining if a [state tort] cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties.' " 486 U.S. at 406, n.4.

Later the *Lingle* Court quoted from *Caterpillar Inc., supra,* as follows:

> Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially dependent on analysis of a collective-bargaining agreement." . . . [C]ontrary to Caterpillar's assertion, . . . respondents' complaint is not substantially dependent upon interpretation of the collective bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement. As the Court has stated, "it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis-Chalmers Corp., supra,* at 212. [486 U.S. at 410, n.10.]

And, finally in this regard, the *Lingle* Court found the following passage from *Atchinson, T. & S.F.R. Co. v. Buell,* 480 U.S. 557, 564-565 (1987), instructive:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*" *Barrentine, supra,* [450 U.S.] at 737. [486 U.S. at 411-12 (emphasis in original).]

Lingle sums up all the foregoing by stating that "§ 301 preemption merely ensures that federal law will be the basis for interpreting collective bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does *not depend upon* the interpretation of such agreements," 486 U.S. at 409 (emphasis added), and "an application

of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application *requires* the interpretation of a collective-bargaining agreement," *id.* at 413 (emphasis added).

The words used in the various formulations of the § 301 test reviewed with approval in *Lingle* are not uniform, but each points towards a consideration of the plaintiff's *claim* and an analysis of whether that claim is based on a contract right or is instead based upon an independent public law right. Reviewing the decision as a whole, rather than pulling from it phrases about "contract interpretation," the fair conclusion is that the adjudication of a claim "depends" on the interpretation of a collective bargaining agreement or "requires" such an interpretation if, and only if, the right the plaintiff claims is created by a labor contract, rather than by a substantive state public law. The Court's subsequent decision in *Rawson, supra,* supports our understanding of *Lingle. See Rawson,* 110 S.Ct. at 1909. *See also id.* at 1915 (Kennedy, dissenting).

G. The proponents of the "quantum of contract interpretation" preemption test invoke two policy interests that underlie § 301. Neither supports the "contract interpretation" preemption approach.

1. The first of these interests is uniformity, which the Court in *Lucas Flour* identified as perhaps the most important interest furthered by § 301 preemption, necessary to assure that the negotiation and administration of labor agreements are not hampered by confusion about the consequences of agreeing to a contract term.

But as *Lucas Flour* itself made clear, and precisely for the reasons already given with regard to § 301's basic purpose, the uniformity imposed by § 301 is the uniform application of a single body of *federal labor contract principles* to all *breach of contract claims.* There is no basis in § 301, in the case law, or in reason for extending § 301 preemption beyond the enforcement of *contract rights* to the enforcement of public law rights that implicate a labor contract question, regardless of the context

within which the question arises. *See also Dowd Box v. Courtney,* 368 U.S. 502 (1962). So long as federal and state courts as well as arbitrators apply the uniform § 301 federal common law to labor contract question, as *Lucas Flour* requires, there is no danger that the parties will be subject to local and varying law as to the nature of their bargain. And such uniformity is all that any contracting party can rationally expect from a uniform system of *contract law.*

2. The second federal interest said to require "quantum of contract interpretation" preemption is a federal preference for arbitral resolution of labor contract claims. There is, of course, a strong policy favoring the arbitration of labor-management disputes, embodied in LMRA § 203(d) and in the *Steelworkers Trilogy.*[11] This presumption does *not,* we submit, have the force to oust state minimum labor standards laws whenever their enforcement arguably requires contract interpretation.

The federal labor policy favoring arbitration covers disputes concerning the majoritarian decisionmaking process embodied in the collective bargaining agreement. LMRA § 203(d), in terms, prefers contractually-established dispute resolution mechanisms as "the desirable method" only "for the settlement of grievance disputes arising over the application and interpretation of an existing collective bargaining agreement", and not for the settlement of public-law based disputes.[12] And, the *Steelworkers Trilogy* as well stressed that the policy favoring arbitration:

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[11] *Steelworkers v. Enterprise Wheel & Carriage Corp.,* 363 U.S. 593, 597 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960).

[12] The language of the Federal Arbitration Act in contrast is considerably broader. That Act covers controversies "arising out of" either the "contract" or the underlying "transaction," as well as any controversy involving "the refusal to perform the whole or any part thereof [of the contract or transaction]." 9 U.S.C. § 2.

> is confined to interpretation and application of the collective bargaining agreement; . . . [The arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. [*Steelworkers v. Enterprise Wheel, supra,* 363 U.S. at 597.]

Thus, many labor arbitrators see public law claims as beyond their ken, and refuse to adjudicate such claims even when asked to do so by the parties. *See Darr v. NLRB,* 801 F.2d 1404 (D.C. Cir. 1986) (arbitrator "saw the NLRB and the courts as ultimately charged with the enforcement of public rights, and arbitrators as responsible for applying labor agreements to determine private rights", and issued an award that he knew to be contrary to the NLRB but that he believed effectuated the intent of the parties). *See also Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 53 (1974).

The limited scope of the presumption favoring labor arbitration has its roots in the fact that the commitment to arbitrate contained in collective bargaining agreements is made by the group, but is binding upon each of the covered individual employees. *Republic Steel Corp. v. Maddox,* 379 U.S. 335 (1965). This commitment makes eminently good sense where the employment rights being arbitrated are themselves the product of the contract; in effect, the substantive employment right was from its origin combined with a commitment to arbitrate, so that the individual upon whom the right was conferred has no basis for claiming that the substantive right should be enforceable in any other manner or fora. Precisely because of their origin, the contract rights subject to arbitral resolution also are collective rights, and it is accordingly the union, and not the individual, that controls access to the arbitration forum.

But where the collective agreement to arbitrate is understood to reach public law rights not rooted in the contract, quite different considerations come into play, as this Court emphasized in *Alexander v. Gardner-Denver, supra*:

> We are unable to accept the proposition that petitioner waived his cause of action under Title VII [by pursuing an arbitration remedy under the collective agreement.] . . . It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different grounds; it concerns not majoritarian processes but an individual's right to equal employment opportunities . . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. [415 U.S. at 51 (citations omitted).]

The same point was reiterated in *Gilmer v. Interstate/Johnson Lane Corp.,* —— U.S. ——, 111 S.Ct. 1647, 1657 (1992), where the Court concluded that a more sweeping policy in favor of arbitration that applies under the Federal Arbitration Act does *not* apply in the context of labor contract arbitration. The Court distinguished the FAA from the LMRA on the ground that labor arbitration is a collectively bargained system that functions to vindicate "rights under a collective bargaining agreement and [not] individual statutory rights," and in light of "the limited authority and power of labor arbitrators." *Id.* at 1657.

Consequently, while the presumption favoring arbitration of labor contract disputes is a broad one, it is not limitless; that presumption has force with regard to rights that are the fruits of the majoritarian decisionmaking process fostered by the collective bargaining system. It follows from this that when state courts resolve contract questions that arise in the course of considering independent state minimum labor standards law claims, they impinge upon no federal arbitration interest, so long as they apply the federal common law of labor contracts in resolving any ancillary labor contract question that may be implicated by the suit.

Were there any doubt on this point, it should be resolved by consideration of the fact that in analogous situations, it has never even been *suggested* that § 301 dictates arbitral resolution of labor contract questions that arise in the course of resolving claims based upon other public law sources. Thus in cases brought under Title VII, courts, including this Court, have regarded it as beyond question that the court, in the course of addressing the Title VII claim, is to resolve such labor contract questions as may arise. See, e.g., *Trans World Airlines v. Hardison,* 432 U.S. 63, 83 n.14 (1977) (considering seniority provision in labor agreement in evaluating anti-discrimination claim); *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 668 n.13 (1987) (interpreting antidiscrimination clause in labor agreement). And in a case that provides the closest of analogies, *Corning Glass Works v. Brennan,* 417 U.S. 188, 209 n.29 (1974), the Court rejected an employer argument that the employer had corrected past violation of the Equal Pay Act, 29 U.S.C. § 206, through negotiation of certain provisions in a collective bargaining agreement, and the Court did so only after reviewing the district court's analysis of the relevant terms of the labor contract. There is once again no suggestion in this analysis that § 301 concerns made such interpretation problematic. *See also Connell Construction Co. v. Plumbers,* 421 U.S. 616, 623, 625 (1975) (interpreting a collective bargaining agreement to determine whether an agreement violated the Clayton Act).

Indeed, in another analogous area where there plainly *is* a federal labor law interest in having one adjudicator and not another decide a question, the Court has concluded that this interest is *not* strong enough to overcome a court's authority to resolve all issues in a case otherwise properly before it. In *San Diego Trades Council v. Garmon,* 359 U.S. 236 (1959), the Court formulated a powerful preemption doctrine that requires all disputes that even arguably involve claims of conduct protected by § 7 or prohibited by § 8 of the Act to be resolved by the National Labor Relations Board. Notwithstanding the

primary jurisdiction of the NLRB to consider unfair labor practice allegations, this Court has ruled consistently that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." *Connell, supra,* 421 U.S. at 626 (considering an antitrust violation). *See also Smith v. Evening News Ass'n,* 371 U.S. 195 (1962); *Kaiser Steel v. Mullins,* 455 U.S. 72, 87 (1982). The Court's judgment has been that while the policy that unfair labor practice claims be decided by the Labor Board is important—and, indeed, is normally paramount—that policy has to bow to the policy favoring the rational handling of litigation in a court that has jurisdiction over the claim before it. Nothing suggests that § 301 embodies a stronger form of preemption than that stated in *Garmon.*

Nor can it be that these cases can be distinguished on the ground that they involve federal, rather than state, regulation. That argument was advanced and squarely rejected in *Metropolitan Life, supra*: "Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. *We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from federal standards.*" 471 U.S. at 755 (emphasis added).

Finally, even if all of this were not so, and there *was* a federal interest in having all questions concerning a labor contract with an arbitration clause wherever the question arises resolved by an arbitrator, and that interest was stronger than the interest in having the NLRB resolve questions under the NLRA, to protect that interest by *abolishing* state law public rights whenever their resolution implicates a labor contract question is the most unreasonable of all imaginable results.

In all other situations in which it is imperative that a second forum decide a question that arises in the course adjudicating a case properly before the first forum, a doctrine of deferral or abstention has been developed, whereby the first forum holds the claim in abeyance while the

preferred forum considers the ancillary question.[13] Thus under the NLRA, the NLRB will in appropriate circumstances defer to labor arbitration, always with the understanding that deferral "is merely . . . a postponement of the use of the Board's process." *United Technologies,* 268 NLRB 557, 560 (1984). *See generally, Collyer Insulated Wire,* 192 NLRB 837 (1971). And under the doctrine of *Railroad Commissioner v. Pullman,* 312 U.S. 496 (1941), federal courts will at times abstain when presented with questions of state law, with the same understanding: that the doctrine involves only postponement, not loss, of federal jurisdiction. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).[14]

[13] At least one judge has suggested that deferral might be appropriate in this context. *See Jackson v. Conrail,* 717 F.2d 1045, 1060 (7th Cir. 1983) (dissenting) (proposing deferral rather than the total elimination of the claim because "it would be surprising if compulsory arbitration of contract disputes was intended to wipe out the employee's common law rights other than his right to enforce the very contracts that are subject to the scheme of compulsory arbitration."), *cert. denied,* 104 S.Ct. 1000 (1984). To our knowledge, no litigant in a state law minimum standard suit has ever even requested deferral. We suspect this is so because in truth, the concerns that have led litigants to allege § 301 preemption have everything to do with its potential to defeat the state law claim altogeher, and little or nothing to do with the concern that contract questions are being decided by judges rather than arbitrators.

If deferral ever were considered, only the contract issue would be an appropriate subject of deferral, since a labor arbitrator generally has no authority to resolve the other issues presented in state law minimum standard cases. *Cf. Hillsborough Tp. v. Cromwell,* 326 U.S. 620, 628 (1946) (abstention inappropriate if there is doubt about the adequacy of a means to determine the state law issue in state court).

[14] Having said that much, we hasten to add that we are skeptical of the need for deferral or abstention in this class of cases. In this case, where no one has suggested that there is a substantial contract interpretation question involved, and where there has been no request by any party to submit the question to arbitration, there is in any event no occasion to consider whether in some instances the benefits of having arbitrators resolve contract questions that arise in the course of resolving noncontractual claims

H. The sum of the matter is this. The statutory right to receive a paycheck on one's last workday is independent of any contractual right, though to be sure, it is of no effect unless there is a paycheck to give, that is, unless there has been an employment relationship, the employee has earned wages due, and the employer has terminated the employee. The essential point is that the "last paycheck" law does not draw its substance from any labor contract; the right is a public law right and has full force and effect whether the parties have negotiated such a rule or not. The fact that the right is stated in general terms and there may be disputes about the details of its application that call for reference to the understandings that govern the employment relationship does *not* make that public law right a private contract right. The state law here, moreover, is *not* one that creates an enhanced penalty for the employer's violation of a collective bargaining agreement; indeed nothing in the record below suggests that the labor contract has been violated or even that the employee claimed that there had been any such breach. The California wage law is thus an example of the most common and venerable state minimum standard law, a law of a kind that the states were enacting long before the passage of the National Labor Relations Act, and that has heretofore always been understood to have survived the enactment of the National Labor Relations Act and the Labor Management Relations Act.

II. SECTION 229 AS APPLIED BY THE LABOR COMMISSIONER IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Respondent incorrectly understood federal law to require California to exclude most unionized workers from the protections of its wage laws. The ultimate question presented in this case is whether such state action which

outweigh the cost and delay inherent in any system of deferral. It is enough to note respondent's decision simply to deprive petitioner of a right altogether because its resolution requires contract interpretation—a decision made as well by many federal courts in this context—under the guise of protecting "contract interpretation," makes no sense at all.

discriminates against the beneficiaries of the federal scheme of collective bargaining is contrary to federal law.

A. While it is not wholly distinct, this question does not fit squarely within any of the well-developed doctrines of federal labor preemption. This case is not in the class of cases involving the exclusive primary jurisdiction of the NLRB to resolve unfair labor practice charges. *San Diego Building and Construction Trades v. Garmon,* 359 U.S. 236 (1959). Neither is it precisely in the class of cases that take their name from *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 140 (1976), *viz.,* the class covering the state regulation of conduct that was meant to be unregulated because left "to be controlled by the free play of economic forces." Although it bears important similarities to the *Machinist's* class of cases, it is not in that class because, as we have just seen, the area of minimum labor standards regulation is not a "no law" area, but an area in which federal law leaves the states free to regulate.

Analysis must then begin with the first principle of preemption, grounded in the Supremacy Clause of the Constitution: that federal law is supreme, and state law that conflicts with or frustrates federal law must give way. *McCulloch v. Maryland,* 4 Wheat. 316, 436 (1819). That principle is the acknowledged starting point for all labor law preemption analysis. *See, e.g., Building and Construction Trades Council v. Associated Builders and Contractors,* 113 S.Ct. 1190, 1195 (1993) (citing cases).

Application of that principle requires consideration of whether there is indeed a federal interest burdened by operation of the state law. The easiest case in this regard is a case in which a state has penalized an employee for exercising an individual right explicitly guaranteed by federal law. In *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), for example, the Court had no difficulty in finding Florida's decision to withhold benefits from an employee solely because she filed an unfair labor

practice charge to be an impermissible burden on that federally created right.

The instant case is like *Nash* in that the respondent directly discriminates against individuals covered by labor contracts containing arbitration clauses; it is different in that there is no individual right to be covered by such an agreement, but rather such agreements are the intended consequence of the operation of the collective right to bargain. But that difference is not determinative; for the *Machinists* line of cases protects just such implicit NLRA collective rights—*viz.* the rights of organized employees and of employers not to be subject to state laws that encroach upon the federal scheme's "no law" area. That being so, this case involves the same mode of analysis that animates the *Machinist* line of cases: whether the state law burdens the operation of the federal scheme taken as a whole.

Preemption based upon concerns implied but not expressed in federal law requires a searching scrutiny of the nature of the federal interest. As the Court stressed in *Belknap v. Hale,* 463 U.S. 491 (1983), to overcome the presumptive validity of state law, more is needed than "broad brush assertions" of burdens on federal rights. *Id.* at 501. We nevertheless believe that analysis of the federal interest here can lead to no conclusion other than that this law, like the law in *Machinists,* is a law that is contrary to the federal scheme.

B. The NLRA does not guarantee employees the right to be covered by labor contracts, or indeed, any guarantee of any contractual rights at all. But, as we have stressed, the entire purpose of the Act is to create a *process* through which such agreements may be reached. The state law here in dispute is a law that discriminates against members of a group that have successfully completed the process of collective bargaining provided for by the federal labor laws. It is difficult to imagine a more direct burden on the federal scheme. As the Court noted in *Metropolitan Life,* "It would turn the policy that animated the Wagner Act on its head to understand it to

have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." 471 U.S. at 756.

C. We hasten to add that the states should, in enacting their laws, take care not to encroach upon areas of exclusive federal concern. But such laws must be based upon *reasonable* concerns about encroaching on the federal scheme, and must in every instance be judged as well by the effect the regulation has on federally protected rights.[15] Here, where the concern about § 301 preemption is fundamentally misconceived, and where the effect of that misconception is to burden directly the operation of the federal collective bargaining law, respondent is in no position to argue that its misunderstanding of the federal law justifies the burdens it has placed on collective bargaining. Whatever power respondent has to write exclusions into its laws in reliance upon the "penumbra" cast by the preemptive force of the federal labor law does not justify excluding unionized workers from the most basic and longstanding minimum standard laws that orbit well outside of that half-light.

By the same token, the states may make accommodations to collective bargaining in their minimum standards laws. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1052 (1987), for example, the Court considered a statute that allows all employers, including unionized employers, to bargain for an alternative to a state minimum standard law. The Court rejected an argument that the law was

[15] Thus in *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), a municipality argued that its refusal to renew the license of a business engaged in a labor dispute was grounded on a desire to remain neutral in that dispute, a desire the municipality believed to be in conformity with federal labor law. Los Angeles further argued that to judge such a position to be itself preempted by federal labor law was to place the municipality in a "no win situation," since whatever action it took it would "stand accused" of aiding one side or the other in the dispute. *Id.* at 619. The Court, finding this argument to be based on a misunderstanding of the relevant federal interests, dismissed it out of hand. *Id.*

preempted as it applied to unionized employers. It found, to the contrary, the opt-out "strengthens the case that the statute works no intrusion on collective bargaining [because it] balance[s] the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment." *Id.* at 22.[16]

The courts have just begun to consider preemption challenges raised in relation to state minimum standard laws that distinguish between unionized and nonunionized workplaces. We doubt that in this case of first impression it will be possible or prudent to devise a rule intended to be responsive to every possible permutation that may arise. This is especially so when the governing principle requires a careful parsing of the interests involved in each case. As in other preemption cases, then, "[t]his penumbral area can be rendered progressively clear only by the course of litigation." *Weber v. Anheuser-Busch*, 348 U.S. 468, 480-481 (1955).

For present purposes it is enough to note that as applied, Cal. Code § 229 has not been and cannot be defended on this or any other similar ground. The provision does *not* allow unionized workers collectively to decide to opt out of California's wage laws in preference to some other collectively bargained arrangement; it simply excludes them, thereby putting them to a Hobson's choice whereby bargaining for a labor contract with an arbitration clause costs them a substantive public law protection that otherwise is vouchsafed to all other employees as a matter of right. Nor does the state provision further a state interest that parallels a federal labor law interest by increasing the security or well being of workers in some manner;

[16] By a parity of reasoning, a nuanced state law that allows unionized workers collectively to opt out of a state minimum standard law if they bargain for similar but not necessarily identical protections, *compare Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993), raises different concerns than those raised here. On analysis a court might conclude that such a law facilitates collective bargaining rather than punishes its exercise.

instead it bluntly discriminates against those who have successfully completed the bargaining process created and encouraged by federal law. Whatever may be said in defense of other laws designed to accommodate the state and federal schemes, this law should be preempted.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KAREN LIVADAS,
Petitioner,
v.
LLOYD W. AUBRY, JR., LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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IN THE
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KAREN LIVADAS, *Petitioner*,
v.
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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

INTERESTS OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 220,000 companies and several thousand other organizations, including over 19,000 corporations, partnerships, proprietorships, and trade and professional associations in the State of California. A significant as-

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of Court.

pect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. The Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[2]

The National Association of Manufacturers of the United States of America ("the NAM") is a voluntary business association of approximately 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with more than 158,000 additional businesses through its Associations Council and the National Industrial Council. The NAM and these Councils provide information and other educational services and publications to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them. The NAM actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts,[3] the United States Con-

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[2] *See, e.g., ABF Freight Syst., Inc. v. NLRB,* —— U.S. ——, 114 S.Ct. 835 (1994); *Building and Constr. Trades Council of Metro. Dist. v. Assoc. Builders and Contractors of Mass./R.I., Inc.,* —— U.S. ——, 113 S.Ct. 1190 (1993); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991); *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27 (1987); *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985); *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978); *NLRB v. Burns Int'l Sec. Servs.,* 406 U.S. 272 (1972).

[3] *See, e.g., General Motors Corp. v. Romein,* —— U.S. ——, 112 S.Ct. 1105 (1992); *Teamsters v. Daniel,* 439 U.S. 551 (1979); *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368 (1974).

gress, the Executive Branch and independent regulatory agencies of the federal government.

This case presents the issue of whether a state infringes the right of employees to bargain collectively under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, ("NLRA" or "the Act") when it adopts a policy of non-interference toward disputes between parties to collectively bargained agreements which provide for arbitration, when to intervene would require the state to interpret or apply the agreement. The case raises the further issue of whether an individual may maintain a claim against the state under 42 U.S.C. § 1983, ("Section 1983") merely by alleging that the federal law at issue pre-empts a state's action when there has been little or no showing that federal rights have been infringed.

These issues are of vital concern to both the Chamber and the NAM and to their respective constituents, many of whom have collective bargaining agreements with unions. Virtually all of these agreements have been negotiated against the backdrop of state laws and regulations that foster the principle of free collective bargaining by excepting from regulation disputes between parties to collectively bargained agreements. A resolution that would broadly prohibit state regulations that seek to foster free collective bargaining would have numerous ill effects. It would disrupt the balance struck by the parties through negotiation by importing into their collectively bargained contracts an inestimable number of statutorily mandated terms. It also would burden the states with newly created enforcement obligations not contemplated by state legislators. Finally, and importantly, such an outcome would create incentives for legislated, rather than negotiated, collective bargaining agreements, a result that is inconsistent with the fundamental goal of the NLRA: free collective bargaining.

The Chamber and the NAM believe that federal labor law is complemented, not undermined, by a state's respect

for the balance struck in collectively bargained relationships. Accordingly, we submit this brief *amici curiae* to urge that the Court reject Livadas' challenge to Section 229 as interpreted by the California Commissioner of Labor and to uphold the Ninth Circuit's Order to the District Court directing entry of judgment in favor of the Commissioner.

SUMMARY OF THE CASE

Karen Livadas, a grocery clerk, was employed in Napa County, California by Safeway Stores. Livadas was a member of Local 373, United Food and Commercial Workers, AFL-CIO ("Local 373" or "the Union"), and the terms of her employment were governed by a collective bargaining agreement between Safeway and the Union. The agreement provides for the arbitration of unresolved grievances filed by the Union and, in certain instances, for an expedited arbitration procedure.

Livadas was suspended by Safeway on December 27, 1989, and was discharged on January 2, 1990. At the time of her discharge, Livadas requested that she be paid the wages due her. Safeway's store manager denied the request because Livadas' payroll records were not at the store. Three days later, on January 5, Livadas received a check for all of the wages that were due her as of January 2, 1990.

On January 9, 1990, Livadas filed a claim with the California Division of Labor Standards Enforcement ("DLSE") asserting that under the California Labor Code she was entitled to a penalty equivalent to three days' wages because she was not paid in full on January 2 when she was discharged. Sections 201 and 203 of the California Labor Code stipulate that discharged employees be paid in full at the time of their discharge and provide, as a penalty for non-compliance, that the wages of discharged employees continue to accrue until paid. On February 7, 1990, the DLSE notified Livadas

that it could not process her claim, stating that she was covered by a collective bargaining agreement; that Section 229 of the California Labor Code precluded it from adjudicating "any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause;" and that a determination of Livadas' wage rate, which was essential to the prosecution of her claim, would require the application of the collective bargaining agreement.

On February 16, 1990, Livadas brought suit in the United States District Court, under 42 U.S.C. § 1983,[4] alleging that the California Labor Commissioner's interpretation of Section 229 and his enforcement policy thereunder violated her right under NLRA Section 7 to bargain collectively. Livadas sought injunctive and declaratory relief, and damages predicated on the DLSE's refusal to pursue her penalty claim. The District Court granted Livadas' motion for summary judgment, ruling that 42 U.S.C. § 1983 provided Livadas with a cause of action and that the DLSE's policy and action deprived Livadas of her right to bargain collectively within the meaning of the National Labor Relations Act. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the District Court. A Court panel agreed that Livadas had a Section 1983 cause of action, but the panel majority concluded that Livadas had failed to establish that the DLSE had deprived her of her right to bargain collectively under the National Labor Relations Act. *Livadas v. Aubry*, 987 F.2d 552, 560 (9th Cir. 1993), *cert. granted*, 114 S.Ct. 907 (1994).

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[4] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

At the time that Livadas brought her suit in the District Court, Local 373 simultaneously was pursuing a grievance on her behalf. The grievance was pressed under the expedited arbitration procedures of the Safeway-Local 373 collective bargaining agreement, and on July 11, 1990, prior to the date on which the District Court granted Livadas' summary judgment motion, the Arbitrator determined that Livadas' discharge violated the terms of the collective bargaining agreement. Accordingly, Livadas was awarded reinstatement and full back pay with interest from the date of her suspension on December 27, 1989 with only minor deductions.[5]

SUMMARY OF THE ARGUMENT

I. The Commissioner of Labor's interpretation of California Labor Code Section 229 does not interfere with, restrain or deny California's citizens the right to bargain collectively, but, rather, leaves the parties free to fashion, without State interference, "a generalized code to govern . . . the whole employment relationship." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). By allowing employers and employee representatives to bargain for the rights and obligations that are most valuable to their constituents, and by allowing them to agree upon arbitration as the method for resolving their disputes, California's enforcement policy accords with the fundamental principles of our Nation's labor laws that foster free collective bargaining while leaving the particular substantive terms of the agreement to the parties. Indeed, Livadas' reinstatement with back-pay, which was secured through the grievance and arbitration provisions of her collective bargaining agreement, demonstrates the efficacy of both the federal and State policies that accord deference to collectively bargained relationships.

[5] The record before this Court omits mention of the arbitration proceeding. The Arbitrator's decision and the underlying grievance are reproduced in the Appendix hereto.

Section 229 as interpreted does not subject employees who exercise their Section 7 rights to discriminatory treatment or penalize the exercise of those rights. That employees covered by collective bargaining agreements do not share the precise statutory benefits and burdens as do non-represented employees is a recognized incident of bargaining and is not discriminatory. Both Congress, in enacting legislation containing exceptions for collectively bargained agreements, and unions, in exercising their latitude during bargaining to waive certain individual rights of their members, have demonstrated their understanding and acceptance of this incident of "collective" action. Further, the Commissioner's policy under Section 229 does not preclude the enforcement of all claims of union-represented employees, for the Section's criteria only bars adjudication of claims involving the interpretation or application of collective bargaining agreements containing an arbitration clause. Conversely, various employee groups that are not subject to the jurisdiction of the National Labor Relations Board—and thus not protected by NLRA Section 7—also are covered by collective bargaining agreements containing an arbitration clause, and therefore also are precluded from pursuing claims pursuant to California's enforcement policy. In sum, California's enforcement policy does not discriminate based upon the exercise of Section 7 rights and does not uniquely burden those federal rights.

II. The mere assertion of a federal right and an allegation of state interference, without more, does not entitle an individual to compel a state to defend a federal lawsuit brought under 42 U.S.C. § 1983. Rather, "the question still remains whether [the] claim . . . comes within the scope of the right that Congress intended to confer." *Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 433-34 (O'Connor J., dissenting).

An extra measure of caution is warranted in inferring Congressional intent to confer an actionable right on individuals against states when, as here, "the rights asserted

impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on States." *Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981). Indeed, such prudence is particularly appropriate given that the core concern of preemption is "the federal structure of the Nation, rather than the securing of rights, privileges and immunities to individuals." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 117 (1989) ("*Golden State II.*") (Kennedy, J., dissenting).

Since there is no plausible nexus between the Commissioner's interpretation of Section 229—which resulted in the California Department of Labor's decision not to proceed with Livadas' penalty claim—and Livadas' claim of interference with her federal right to bargain collectively, a cause of action under Section 1983 simply does not lie. Livadas' claim of a violation of her Section 7 right to bargain collectively is too "vague and amorphous" to be enforceable.

III. Many states have laws that contain exceptions for employees covered by collective bargaining agreements—laws that have provided a backdrop against which unions and employers have bargained contracts for almost sixty years. These laws generally presume that employees who exercise their Section 7 rights will be fairly represented at the bargaining table by unions that will obtain for the represented employees terms and conditions in excess of statutorily mandated minimums and that these terms will be secured through grievance and arbitration agreements.

This system and the delicate balance that collective bargaining represents may be jeopardized by a sweeping judicial pronouncement that states may no longer presume that unionized employees will win more at the bargaining table than non-union employees, or that the bargains they have struck will be secured through grievance and arbitration agreements. A broad new application of state employment laws to parties to collectively bargained

agreements could well impose upon those parties terms that may have been expressly negotiated away for other more valuable rights.

When unions or employers perceive themselves as better able to secure gains by their conduct away from the bargaining table, whether by way of their political power or by their litigation resources, the concept of free collective bargaining upon which the National Labor Relations Act is based is substantially eroded. It is precisely because the NLRA seeks to further "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract[]" (*H.K. Porter v. NLRB*, 397 U.S. 99, 108 (1970)) that deference to collectively bargained agreements should not be rejected based upon an attenuated claim of harm of the sort asserted by Livadas.

ARGUMENT

I. LIVADAS' SECTION 7 RIGHTS HAVE NOT BEEN IMPINGED UPON BY THE STATE OF CALIFORNIA.

This Court, in an early case interpreting the preemptive effect of the National Labor Relations Act on state legislation, observed: "[w]e deal . . . not with the theoretical disputes but with concrete and specific issues raised by actual cases." *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 739, 746 (1942). Expounding on this theme, Justice Frankfurter later stressed the necessity of analyzing the claim of harm to NLRA rights in relation to the concrete action of the state:

> It is . . . clear that the boundaries within which a State may act are determined by the terrain and not by abstract projection. . . . The adjustment thus called for between State and National interests is not attained by reliance on uncritical generalities or

rhetorical phrases unnourished by the particularities of specific situations.

Amalgamated Assoc. of Street, Elec., Ry. and Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U.S. 383, 403 (1951) (Frankfurter, J., dissenting).

In this case, Livadas' claim rests upon the premise that the Commissioner's interpretation of California's statute has interfered with her federal right to bargain collectively under NLRA Section 7. Yet, rather than providing a concrete analysis of how California's action limited, prevented or hindered bargaining in her case, Livadas and her supporting *amici* make expansive claims of harm to Livadas' Section 7 right that are in no way "determined by the terrain" of this case, but instead, are based upon "abstract projections" and "uncritical generalities."

Far from interfering with, restraining or denying California's citizens the right to bargain collectively, the Commissioner's interpretation of California Labor Code Section 229 leaves the parties free to fashion, without state interference, "a generalized code to govern . . . the whole employment relationship." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). *See also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) ("*Golden State I*"); *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 551 (1979); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959). Indeed, California's policy accords with the fundamental predicate of our nation's labor laws of fostering an equitable process for bargaining without interfering with "particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985). Moreover, as we show below, the Commissioner's policy of refraining from taking action that will, more likely than not, conflict with the

collectively bargained agreement's terms and thereby impede the process of arbitration, further accords with the federal scheme.[6]

A. Section 229 As Interpreted Accords With The Federal Policy Articulated In The NLRA Of Honoring The Right Of The Parties To Bargain Collectively.

Consistent with its concern for ensuring fairness in the process of bargaining rather than for mandating a particular final product, Congress, in enacting the NLRA, left intact the states' "traditional[] . . . latitude under their police powers to legislate as to the protection of the lives, health and comfort, and quiet of" their citizens. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 756, *quoting, Slaughter-House Cases*, 16 Wall 36, 62 (1873) *and Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149 (1855) (internal quotations omitted). Accordingly, this Court has sanctioned certain state laws that have the effect of imposing terms on parties to the collective bargaining process through mandatory minimum labor standards. *See, e.g., Metropolitan Life, supra*; *Malone v. White Motor Corp.*, 435 U.S. 497, 514 (1978). Similarly, federal labor policy is not offended by a state's decision not to interfere where parties have, by negotiation, created their own code to regulate the terms and conditions of employment. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Indeed, as this Court ob-

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[6] This case does not require answering the question of whether a state may create a so-called "minimum standard" enforcement policy of a wage statute aimed at the protection of non-represented employees, although it seems clear that a state, in the exercise of its police powers, may do so. Nor need the Court determine whether or not California *would be* pre-empted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, *if* it applied its statutory scheme to employees with collective bargaining agreements containing an arbitration clause. Certainly, the Court need not—and the Chamber and NAM respectfully submit, ought not—accept the AFL-CIO's invitation to reconsider the scope of Section 301 pre-emption.

served in *Fort Halifax*, "[i]f a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption . . . surely one that permits such bargaining cannot be pre-empted." *Id.* at 22 (emphasis in original).

We submit that Section 229 *encourages* parties to bargain and accords appropriate deference to the product of their bargaining where provision is made for the arbitration of their disputes. This is consonant with first principles of federal labor policy, articulated in the *Steelworkers Trilogy*, favoring the creation of a "generalized code" to govern the workplace and deferring to the resolution of industrial disputes through the grievance-arbitration provisions of collective bargaining agreements. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). California's policy quite appropriately avoids entanglement with both the bargaining process and its end result and presents no direct conflict with the federal right to bargain collectively.

B. Section 229 And The California Labor Commissioner's Enforcement Policy Derived From That Statute Neither Discriminated Against Livadas Nor Interfered With Her Right To Bargain Collectively.

Notwithstanding the contrary arguments of Livadas and her supporting *amici*, Section 229 as interpreted does not in any way subject employees who exercise their Section 7 rights to discriminatory treatment or penalize the exercise of those rights. First, and as a general matter, the mere fact that employees who are covered by collective bargaining agreements do not share the precise set of statutory benefits and burdens as do other individuals who have chosen not to enter into such contracts is not, in and of itself, discriminatory. As demonstrated in the brief *amici curiae* for the Employers Group *et al.*, many federal statutes setting minimum labor standards provide exceptions

for employees covered by collective bargaining agreements, including the federal Fair Labor Standards Act and the Service Contract Act (See Brief *Amici Curiae* for the Employers Group, *et al.* in Support of Respondent, pp. 25-26). Similarly, it has long been recognized that employees ought to be allowed to pursue collectively, through the bargaining process, the set of protections most advantageous to them, and that, to effectuate this goal, unions are empowered in many cases to "waive [individual] member's statutorily protected rights." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983).[7] In both contexts, employees may "lose" certain protections enjoyed by other individuals "because" they have exercised their Section 7 right to bargain collectively. In neither case, however, have employees been subject to discrimination because they have exercised Section 7 rights. It is clear, in light of this general scheme, that a state may adopt a "hands off" policy for parties who have collectively bargained an agreement and leave them to the benefit of their bargain, particularly where the state limits its deferential stance to those cases in which the protection of the arbitral process is guaranteed by contract. There is a reasonable presumption that employees who exercise their Section 7 rights to bargain collectively will obtain terms and conditions of employment in excess of the statutorily mandated "minimums" if their union fairly represents their interests at the bargaining table.

Importantly, however, the Commissioner's policy under Section 229 does not uniquely preclude the enforcement

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[7] States and the federal government may deem certain rights not subject to waiver, such as the right to choose one's bargaining representative, *Metropolitan Edison*, 460 U.S. at 705-706, *citing*, *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974), the right under Title VII to be free from employment discrimination, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1981), and the right to certain mandated insurance benefits. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 758.

of the claims of "union workers" under "union contracts," notwithstanding Livadas' insistence to the contrary (See Pet. Br. 4-5). For example, the Section 201 and 203 claims of union members covered by collective bargaining agreements containing no arbitration clauses, such as "short form" contracts common in the construction industry, may be adjudicated by the Commissioner under this State policy (See Resp. Br. Opp. Cert. 4, n.4). Similarly, other claims that do not in any way involve interpretation or application of the collective bargaining agreement are entertained by California's Labor Commissioner, such as actions to recover wages due on a non-sufficient funds check, or actions for recovery of work tools of an employee wrongfully retained by the employer, or actions for damages for the employer's failure to release these tools (*Id.* at 4, n.5). Similarly, the Commissioner will entertain claims in which the statute does not require that the terms of a collective bargaining agreement be interpreted or applied, such as actions to recover mandatory minimum wages and enforcement actions to prohibit retaliation or discrimination in terms and conditons of employment (*Id.* at 4, n.7).

Conversely, there are instances in which California's non-enforcement policy equally would extend to employees who are covered by a collective bargaining agreement with an arbitration clause, but who nevertheless are without the protections afforded by Section 7 of the NLRA. Thus, the National Labor Relations Board has exercised its discretion under Section 14(c) of the NLRA, 29 U.S.C. § 164(c), to decline to exercise jurisdiction over industries, establishments, and enterprises that do not meets its jurisdictional standards. *See generally NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684 (1954). Most of these entities can be described as essentially local in nature. Moreover, the Board also refuses to assert jurisdiction over entire industries which, by no means, can be said to be purely local —the horse-racing and dog-racing industries. *See* National Labor Relations Board Rules and Regulations, as amended, § 103.3. *See also* Theophil C. Kammholz & Stanley R. Strauss, *Practice and Procedure Before the National Labor Relations Board*, § 3.02 (4th ed. 1987). As a result, individuals employed by such exempted entities can be said to have no enforceable Section 7 rights, but nevertheless they, too, could have claims that would be excepted from enforcement under Section 229 because their terms of employment are encompassed in collectively bargained agreements.

In short, California's statutory scheme is neither a discriminatory scheme based upon "union" membership, nor, paraphrasing Livadas, an interference with the assertion of the Section 7 right to have a bargaining representative who bargains collectively for an arbitration clause (Pet. Br. 16-17). Rather, it is merely the different treatment of employees who (1) are covered by collective bargaining agreements containing arbitration provisions and (2) whose claims cannot be resolved unless the Commissioner were to apply or interpret the agreement in violation of the State's policy. As explained above, this *different* treatment of differently situated individuals by California is not *discrimination* based upon the exercise of Section 7 rights and does not uniquely burden those federal rights. Here, as in *Fort Halifax, supra*, in which a broad contract exception to Maine's severance-payment statute was held not to target or uniquely burden parties to agreements bargained pursuant to Section 7, California's limited collective bargaining agreement exception is *not* a "union" contract exception. *Cf. American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965) (noting that, although right of employer to use the "lockout" weapon had an impact upon employees' latitude to strike and upon their stance in bargaining, such an *effect* was not an illegal *interference* with the employees' right under Section 7 to bargain collectively).

In addition to not discriminating against employees who exercise their Section 7 rights, Section 229 as inter-

preted does not conflict with federal law by "interfer[ing] with the exercise of these federally protected rights[.]" *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984) (holding state statute that accords with Congress' policies under federal labor law not to be pre-empted merely because it regulates conduct covered by Section 7). Thus, although Livadas attempts to drape herself in the mantle of *Nash v. Florida Indus. Comm.*, 389 U.S. 235, 237 (1967), Livadas' case is not analogous to Nash's case. Nash filed an unfair labor practice charge disputing the lawfulness of her termination under the NLRA and was denied unemployment compensation benefits because, under Florida law, employees involved in labor disputes were barred from collecting such benefits. *Id.* at 237. Accordingly, the immediate and direct result of having asserted her federally protected right to file an unfair labor practice charge was Nash's loss of a state benefit. The Court said: "like the coercive actions which employers and unions are forbidden to engage in, [Florida's actions] ha[d] a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." *Id.* at 239.

By contrast with Nash's plight, Livadas' right to bargain collectively plainly was not undermined by the Commissioner's policy. Rather, the sanctity of the bargain that had been struck on Livadas' behalf—as well as her rights and remedies negotiated thereunder——was observed to the letter. Indeed, although not shown in the record before the Court, Livadas' contractual remedies better effectuated her rights than would have the successful prosecution of her claim for a penalty of three days' wages. For, again, returning to the "terrain of this case," it appears that Ms. Livadas, with the assistance of the Union lawyers who have represented her in the courts below and now in this Court, simultaneously availed herself of the grievance and expedited arbitration procedures available under the collective bargaining agreement negotiated on her behalf. As a result of this process, the Arbitrator determined that Ms. Livadas not only was entitled to be reinstated to her position at Safeway without loss of seniority, but also that she was entitled to *full back-pay* from the date of her pre-termination suspension with interest, less minor deductions.[8] We have reprinted, in the Appendix hereto, the opinion of the Arbitrator predicated on the grievance asserted on behalf of Ms. Livadas, which we have also reprinted.[9]

When one eschews Livadas and her supporting *amici*'s "uncritical generalities" and "rhetorical phrases unnourished by the particularities of [the] specific situation" (Frankfurter dissent, *supra*) several propositions become clear. First, far from being disadvantaged because she was employed under a collective bargaining agreement, Ms. Livadas quite clearly obtained more relief than a similarly situated Californian would have obtained without such a contract. Indeed, had the Commissioner of Labor devoted his resources to Ms. Livadas' claim, it would be the non-represented Californian who would be disadvantaged by the inevitable delay caused by the Commissioner's expanded jurisdiction. Second, returned as she was to her job, essentially with full back-pay plus interest, and an arbitral pronouncement that her termination was unjustified, Ms. Livadas could not reasonably be left with the impression that the incidents of collective bargaining are a burden on one's legal rights or that any minor

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[8] The deductions were for interim earnings, and for an apparently unwarranted continuance necessitated by her union's failure to participate at an earlier scheduled arbitration hearing. (Appendix at 7a-8a).

[9] The relevance of the arbitration award is apparent in light of Ms. Livadas' broad claims of harm. Moreover, the relevance of the award is underscored when one notes that the back-pay remedy accorded Ms. Livadas apparently mooted any claim for penalty wages. This is because, as the Commissioner has noted in his brief on the merits, a defense to a penalty wage claim is the employee's ultimate reinstatement with full back pay (*See* Resp. Br. 4).

diminution in individual statutory "rights" is not offset by collective gains.[10]

Finally, and obviously, Livadas' case does not provide, as suggested by Judge Kozinski in his dissent and echoed in the Solicitor General's brief (S.G. Br. 9), California employers with a union-chilling tale of the grievous effects that befall union employees who are "abandoned" by the State Labor Commissioner and forced to use the remedies available under grievance and arbitration agreements. Indeed, when all is said and done, the actual facts of Livadas' case demonstrate the propriety of the policy choice articulated by Section 229 as interpreted. This policy allows the parties to collectively bargained contracts to choose the set of rights that best effectuate their collective goals. And, where the contract provides for arbitration, the State appropriately defers to this machinery, thus "allow[ing] the parties to resolve [their employment related] matters without the unsettling effect of State regulation." *Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir. 1991).

II. THIS CASE DOES NOT PRESENT A CLAIM COGNIZABLE UNDER 42 U.S.C. § 1983.

As we have shown, Section 229's collective bargaining exception does not, as interpreted, interfere with Livadas' Section 7 right to bargain collectively. Indeed, this "hands off" policy is in complete accord with federal labor policy. Accordingly, the Commissioner properly may decline to entertain claims like Livadas' without fear of being pre-empted by the NLRA. Nonetheless, even

[10] Thus, the dim picture painted by Ms. Livadas of the "ongoing choice [of] . . . whether to retain collective bargaining and grievance arbitration" in light of the "Commissioner's abandonment" of "already-unionized employees, like Livadas herself," is a disingenuous portrait at best (Pet. Br. 14). Left to the mechanisms of their collectively bargained contracts and the grievance machinery in place thereunder, it appears that employees like Livadas certainly gain more than Labor Code Sections 201 and 203 would afford them.

assuming that the Commissioner's policy presents a chain of circumstances that in some remote sense impinges upon the exercise of a Section 7 right, this is not the sort of harm that should be cognizable under 42 U.S.C. § 1983.

In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) ("*Golden State II*"), the only case in which this Court has considered a Section 1983 claim flowing from pre-empted State action,[11] the Court majority held that action taken by Los Angeles in contravention of the National Labor Relations Act, and thus pre-empted by that Act, could form the basis of an action by the aggrieved company against the City under 42 U.S.C. § 1983. In its prior opinion deciding the underlying pre-emption issue, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) ("*Golden State I*"), the Court held that Los Angeles had directly interfered with the Company's clear NLRA right to use its economic weapons during a strike by conditioning Golden State's license renewal on its settlement of the strike with its unionized employees. Accordingly, the City's actions were held pre-empted by federal labor law because they regulated conduct that Congress, in enacting the NLRA, intended to be free from all governmental interference. 475 U.S. at 614. Because the federal right was plain and unambiguous, expressing a Congressional mandate rather than a preference among a range of permissible policy choices, and because the City's action clearly interfered with that individual federal right, the Court majority in *Golden State II* declared that a suit under Section 1983 was not foreclosed. 493 U.S. at 106, 112-113.[12]

[11] Although pre-emption and Section 1983 coincided in another case, *Felder v. Casey*, 487 U.S. 131 (1988), that issue arose when a state's attempt to apply a state procedural rule to a Section 1983 claim was held pre-empted by Section 1983 itself.

[12] As we read the dissenting opinion in *Golden State II*, the Chief Justice and Justices O'Connor and Kennedy would hold that

Although observing that state interference with NLRA rights could form the basis of a Section 1983 action, the Court majority in *Golden State II* cautioned that "it would be obviously incorrect to assume a federal right of action pursuant to Section 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Id.* at 108. In like regard, here it would be inaccurate to conclude that the mere assertion of a federal right and an allegation of state interference, without more, entitles an individual to compel a state to defend a federal lawsuit brought under Section 1983. Rather, "the question still remains whether [the] claim . . . comes within the scope of the right that Congress intended to confer." *Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 433-34 (1987) (O'Connor, J., dissenting). For, while a right may, as a general proposition, be clear and articulable, we submit that the invocation of that clear right in a particular context may present a claim far too "vague and amorphous" to be enforceable. *Golden State II*, 493 U.S. at 106, *quoting, Wright v. Roanoke*, 479 U.S. at 432.

Moreover, an extra measure of caution is warranted in inferring Congressional intent to confer an actionable right on individuals against states when, as here, "the rights asserted impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on States." *Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981). Indeed, such prudence is particularly appropriate given that the core concern of pre-emption is "the federal structure of the Nation, rather than the securing of rights, privileges and immunities to individuals." *Golden State II*, 493 U.S. at 117 (Kennedy, J., dissenting). Thus, we submit that

federally pre-empted state action does not give rise to a Section 1983 cause of action. Applied here, that position would, of course, be dispositive, and the issue concerning the chimerical impact of California's action on NLRA rights would not need to be addressed.

more than theoretical injury must be asserted before concluding that putative harm to the Section 7 right to bargain collectively may be used as a rationale for imposing affirmative obligations on the Commissioner of Labor to broaden the class of claims within his jurisdiction.

If all that Section 1983 requires is that Livadas invoke her Section 7 right and assert an imaginable, albeit unlikely, harm to that right from a state's policy decision, Livadas would be correct and so would the courts below that Livadas has a cause of action under Section 1983. But under this Court's majority opinion in *Golden State II*, much more is required; it must be shown that an actual, demonstrable interference with Livadas' right to bargain collectively under Section 7 has occurred—a showing, as we have demonstrated, Livadas has not made.[13] *Cf. Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir. 1991) (finding demonstrable interference with Section 7 right).

Here, by focusing almost exclusively on the narrow issue of whether the right to bargain collectively was a right of the individual or only of the representative through whom this right is realized, the courts below failed to address the basic issue presented in this case—whether the interference alleged to flow from California's action was actually too "vague and amorphous" to create a right of action under Section 1983. *Golden State II*, 493 U.S. at 106. *See also, Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. at 432.

In sum, because there is no plausible nexus between the Commissioner's interpretation of Section 229—which resulted in the California Department of Labor's decision not to proceed with Livadas' penalty claim—and Livadas'

[13] This proposition accords with California's reasoning in its brief on the merits that, absent a clearly defined federal obligation, a state official's exercise of his discretionary authority to comply with state law should not be subject to federal review and revision under Section 1983 (See Resp. Br. 44-49).

allegation of interference with her federal right to bargain collectively, we submit that a cause of action under Section 1983 simply does not lie.[14]

III. THIS CASE SHOULD NOT BE THE PREDICATE FOR A NEW RULE THAT UPSETS STATUTORY DEFERENCE TO COLLECTIVELY BARGAINED AGREEMENTS.

Many states have laws that contain exceptions for employees covered by collective bargaining agreements. Indeed, these laws have provided a backdrop against which unions and employers have bargained contracts for almost sixty years. (See, e.g., Employer's Group Br. 28-30, B-1—B-6). As noted earlier, these laws generally presume that employees who exercise their Section 7 rights will be fairly represented at the bargaining table by unions that will obtain for the represented employees terms and conditions in excess of statutorily mandated minimums, and that these terms will be secured through grievance and arbitration agreements. This is the hallmark of the free collective bargaining process established by the NLRA and unique among industrialized countries.

This system and the delicate balance that collective bargaining represents may be jeopardized by a sweeping judicial pronouncement that states may no longer presume that unionized employees will win more at the bargaining table than non-union employees, or that the bargains they have struck will be secured by the grievance and arbitration process. Parties to such agreements may have imposed upon them contract terms that may have been expressly negotiated away for other more valuable rights; or, as was stated by the Ninth Circuit in *Barnes v. Stone Container Corp.*, *supra*, terms that have the "untoward effect of . . . alter[ing] incentives to negotiate." 942 F.2d at 693.

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[14] The U.S. Chamber and the NAM obviously believe that the Ninth Circuit Court of Appeals arrived at the right outcome in this case, even as it did so upon premises with which they would not necessarily concur.

Indeed, the concept of meaningful collective bargaining itself may be jeopardized. The National Labor Relations Board has observed, "[a]ll agree that bargaining can occur within a corridor of bargaining subjects, but one's view of whether bargaining is meaningful under the National Labor Relations Act turns, in part at least, on the narowness of the corridor." *Res Care, Inc.*, 280 NLRB 670, 674 (1986). Further, the Board has stated that the key to the bargaining process is "the ability to engage in the necessary 'give and take' which is a central requirement of good-faith bargaining and which makes bargaining meaningful." *Id.* It is the parties at the bargaining table who alone determine whether an agreement will be reached.

If either unions or employers perceive themselves as better able to secure gains by their conduct away from the bargaining table, whether by way of their political power or by their litigation resources, the concept of free collective bargaining upon which the National Labor Relations Act is based will be substantially eroded. This is at least, in part, the lesson of *Golden State I*. There, the union's pressure upon the City Council at public meetings led the Council to condition renewal of the struck employer's license on a settlement with the union. 475 U.S. at 610-11. But, this use of political pressure to achieve leverage not available at the bargaining table was as inconsistent with the fundamental principles of free collective bargaining—and as integral to this Court's decision condemning the City's action—as the City's interference with the employer's NLRA right to withstand a strike. So too here, the potential for judicially imposed or legislated terms which narrow the "corridor" of bargaining and limit the meaningful give and take which takes place during this exchange must not be disregarded in the ultimate disposition of this case.

The liberty of states to regulate certain minimum employment standards ought not be transformed into a man-

date that states must regulate all employment relationships or none. The freedom to bargain collectively surely would be abridged if states were required to legislate a "minimum terms" contract, the contours of which would be formed by the political power of unions or employers, instead of by the respective economic power of the parties at the bargaining table, as intended by the NLRA.

It is precisely because the NLRA seeks to further "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract[]" (*H.K. Porter v. NLRB*, 397 U.S. 99, 108 (1970)) that deference to collectively bargained agreements should not be rejected based upon an attenuated claim of harm of the sort asserted by Livadas.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce and the National Association of Manufacturers urge this Court to uphold the Ninth Circuit's Order to the District Court to enter judgment in favor of the California Labor Commissioner.

Respectfully submitted,

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APPENDIX

APPENDIX

ABBREVIATED OPINION & DECISION OF BARBARA CHVANY ARBITRATOR

San Francisco, California
July 11, 1990

IN THE MATTER OF AN ARBITRATION

between

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 373,
Complainant

and

SAFEWAY STORES, INC.,
Respondent

RE: THE DISCHARGE OF KAREN LIVADAS

APPEARANCES

On Behalf of the Union:

Barry S. Jellison, Esq.
DAVIS, COWELL & BOWE
100 Van Ness Avenue, 20th Floor
San Francisco, CA 94102-5209

On Behalf of the Employer:

Mr. John J. Baruch
Labor Relations Associate
FOOD EMPLOYEES COUNCIL, INC.
2000 Crow Canyon Place, Suite 200
San Ramon, CA 94583

INTRODUCTION

This dispute arises under the Collective Bargaining Agreement between the above-captioned Parties (JX 1). Pursuant to the expedited arbitration procedures of the Agreement, the undersigned Arbitrator was mutually selected and an arbitration hearing was conducted on April 6, and May 1, 1990 in Vallejo, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. A verbatim transcript of the proceedings was taken (cited herein as TR ——). The Parties stipulated that the prior steps of the grievance procedure have been followed or waived and the matter is properly in arbitration (TR 5). Post-hearing briefs were filed by the Parties, and the matter was deemed submitted for decision on June 15, 1990. This constitutes an abbreviated Opinion & Decision. Either Party may request a full Opinion (TR 282).

The Grievant, Karen Livadas, was hired by the Company April 16, 1973. She was suspended on December 27, 1989 and was discharged effective January 2, 1990 (TR 5-6). As the time, she was a full-time journeyman clerk at Store No. 989 in Vallejo, California (TR 6).

ISSUE

Whether the Grievant, Karen Livadas, was discharged for just cause; and, if not, what shall be the remedy? (TR 2)

REMEDY REQUESTED

The Union requests the Grievant's reinstatement with full seniority, backpay and all contractual benefits. The Union contends that backpay should not be tolled, as the Company requests, and that the Company should be required to pay its share of the Arbitrator's cancellation fee for March 1, 1990 (TR 2; UN BF 25-26).

The Company seeks denial of the grievance in its entirety (TR 2; CO BF 37). In the event a remedy is found to be owing, the Company requests that any backpay be

tolled from and after March 1, 1990, because the Union refused to proceed to hearing on that scheduled date (TR 3). The Company also takes the position that the Union should be responsible for 100% of the Arbitrator's cancellation fee for March 1, 1990.

ABBREVIATED OPINION

The discharge of the Grievant is based upon two separate charges: (a) an alleged racial slur toward a customer; and (b) alleged misconduct involving the use of a coupon. Both incidents occurred in December 1989. Upon a thorough review of the record, it is found that the Employer has failed to sustain its burden of proof as to both charges, for the reasons summarized below.

The first charge is based upon a customer complaint by Richard Wolgamott, who testified the Grievant called his wife a Filipino bitch in his presence, while he and his wife were being checked out by the Grievant at the Store. The Grievant denies making this statement or any other racial slur to either Wolgamott or his wife, and the Grievant claims that Wolgamott's wife was not even with him at the time. Therefore, credibility is crucial to an assessment of this charge.

The allegation is a serious one. A deliberate racial epithet directed towards a customer, if proven, constitutes serious misconduct that may warrant summary termination under the Collective Bargaining Agreement. Such intentional abusive conduct is distinguishable from a mere failure to perform work as required. Certainly, no customer should be required to suffer racial abuse from a clerk, and an employer has a legitimate interest in prohibiting such offensive behavior towards customers. But, the Company bears the burden of establishing such a serious charge by reliable evidence.

Wolgamott's credibility is essential to the Company's case, because his testimony stands alone to support the

charge. Wolgamott's wife, the alleged target of the racial slur, did not testify.[1] As outlined below, there are several reasons to question the reliability of Wolgamott's account.

Wolgamott's credibility is cast into doubt by several elements in the record: internal contradictions in his own testimony; other evidence which contradicts his testimony on a number of significant points; and evidence that he sought to gain monetarily from asserting this complaint. On several points, he was shown to exaggerate and overdramatize, and it is difficult to determine where the simple truth ends and the embroidery begins.

Concerns about Wolgamott's candor are amplified when his testimony is compared with the other testimony and evidence in the record. There are unresolved doubts as to whether Wolgamott was accompanied by his wife when the incident occurred. These doubts are not based solely upon the Grievant's testimony. There are also unresolved questions as to what Wolgamott originally reported to the Company, and whether his initial reports were consistent with his account at the hearing. There is unrebutted testimony that, at the Board of Adjustment, the Company alleged the Grievant made a completely different racial comment, to Wolgamott, than the one described at the hearing. This and other evidence suggests the original complaint was different from his later testimony. These questions and inconsistencies remain unexplained. For all these reasons, the unsubstantiated testimony of Wolgomott is found to be insufficient to support this charge.

The Arbitrator suspects that some sort of exchange occurred between Wolgamott and the Grievant that caused him to lodge a complaint against her. But, whether this involved some remark with racial content, or otherwise was due to improper conduct by the Grievant, is uncer-

[1] No explanation is offered as to why she did not appear notwithstanding the crucial credibility issues involved in this case.

tain.[2] In this proceeding, the decision may not be based upon suspicion or conjecture. The Arbitrator is bound by the just cause requirement of the Agreement to apply accepted standards of proof, and they have not been met on this charge.

The Arbitrator has grave concerns that the Grievant may not have gotten the message inherent in her lengthy suspension in 1986 for an incident involving a racial remark, if, indeed, the instant matter involves a recurrence of such conduct. However, the fact that the Grievant was disciplined in the past does not establish that she, in fact, engaged in similar conduct in December, 1989. On the other hand, the Arbitrator has equally grave concerns that the Grievant may have been targeted for disciplinary action due to past events, and may be receiving less than a fair shake from her superiors in the Store (see, *e.g.*, TR 161).

The latter concern is underscored by the fact that serious breaches of the Grievant's due process rights occurred in this case. For example, although the incident underlying this charge occurred sometime in early December, the matter was first raised with the Grievant on December 27, 1989. The Company terminated the investigatory meeting on that date when the Grievant requested Union representation, and she was never provided an opportunity to present her version of events prior to her termination. The Grievant has a right to request Union representation, and such a request does not relieve the Employer of its obligation to conduct a full and fair investigation.

In addition, the Employer terminated the Grievant prior to receiving a written statement from the complaining customer, and apparently before the factual basis for the charges had been identified with any specificity. It is unclear when the Employer finally received specific in-

[2] There is evidence that requiring identification and/or approval of an out-of-state check was involved.

formation from Wolgamott about what the Grievant had said or done to offend him. Even his written complaint, finally submitted approximately a month after the fact, does not identify the alleged racial slur made by the Grievant (CX 7). As noted above, the specific allegation made by the Company at the Board of Adjustment differed substantially from the testimony of the complaining customer at the hearing. All of these circumstances demonstrate a breakdown of due process in the handling of the Grievant's case.

With respect to the charge involving the coupon, the record fails to show fraudulent or intentional misconduct on the Grievant's part. The record supports a finding that the Grievant combined in a purchase with another employee, Gary Massucco, and used her employee coupon for that combined total purchase.[3] There is no evidentiary support for the Company's claim that sharing in the purchase of the basketball cards was something fabricated by the Grievant after-the-fact in an attempt to cover-up misconduct. The Company did not show that the merchandise purchased was clearly excluded from the coupon discount.

The Grievant testified she believed Massucco did not get a coupon, and her testimony in this regard is consistent with what she told Annette Phillips, the checker who handled the transaction, at the time the transaction took place. There was no showing that she knew Massucco had received or used another coupon as of the date in question. As an employee, Massucco was also entitled to an identical coupon.

The Grievant, Annette Phillips and Gary Massucco all testified they did not think they were doing anything wrong by engaging in this transaction. The Company accepted Phillips' assertions in this regard, but rejected

[3] The coupon was of a type issued by the company to all employees in Northern California.

the Grievant's and Massucco's.[4] If this transaction was so obviously improper, as the Company claims, it is unclear why the Company excused Phillips from any responsibility, since the record shows she was fully aware of the circumstances involved in the transaction. She was not disciplined. While it would have been prudent for the Grievant to have checked with the store Manager in advance of this transaction to insure that it would be acceptable, that failure in judgment does not amount to improper conduct justifying summary termination. No intent to deceive or defraud the Company was shown on the Grievant's part. Given this fact, and the fact that Phillips was not disciplined at all, grounds for lesser discipline have not been established.

With regard to the question of the cancelled hearing date of March 1, 1990, the Union now argues that delays due to continuances are routine and that such postponements do not result in tolling of back pay awards. The Union also contends the continuance from March 1 to April 6 was justified due to the Company's refusal to provide certain information, in violation of the grievance procedure.

What the Union's argument ignores is that the continuance ordered by the Arbitrator was necessitated by the Union's refusal to participate in the hearing on March 1, 1990, even for the purpose of presenting a motion for a continuance. In fact, at no time did the Union present or support such a motion. For this reason, the Arbitrator has no basis now to find the delay caused by the Union's refusal to participate on March 1, 1990 was necessary or appropriate. Under the circumstances, it is found that the backpay remedy should be tolled for the period of the delay, and that the Union is responsible for 100% of the Arbitrator's cancellation fee for March 1, 1990.

[4] Gary Massuoco was terminated based, in part, on this incident. His discharge was upheld by another Arbitrator on other grounds.

Accordingly, the following Decision is made:

DECISION

1. The discharge of Karen Livadas was not for just cause.

2. As a remedy, Ms. Livadas shall forthwith be reinstated to her former position, without loss of seniority. She shall receive full backpay from the date of her suspension until the date of her reinstatement, minus the period March 1, 1990 to April 6, 1990 and any earnings from other employment. Interest pursuant to Section 18.7 shall be paid on the backpay award.

Ms. Livadas' contractual benefits for the period from her suspension to her reinstatement shall be restored in the amounts and manner prescribed by the Collective Bargaining Agreement.

3. The Arbitrator retains jurisdiction over the implementation of the remedy herein, in the event a dispute arises.

4. Pursuant ot Section 18.5, all jointly incurred arbitration expenses involved in this case shall be borne by the Company, with the exception that the Union shall be responsible for 100% of the Arbitrator's cancellation fee for March 1, 1990.

/s/ Barbara Chvany
Arbitrator

UNITED FOOD & COMMERCIAL
WORKERS UNION—LOCAL 373

Chartered by the United Food & Commercial Workers International Union, AFL-CIO & CLC

December 29, 1989

Mr. William Daly
Contract Administrator
Safeway Stores, Inc.
47320 Kato Road
Fremont, CA 94538-7334

Re: Karen Livadas
Suspension and/or Termination

Dear Mr. Daly:

On behalf of the above noted member we protest the suspension imposed with no written documentation and little to no verbal reason given to either her or this Union.

We have been attempting for three days to determine the duration of Ms. Livadas suspension, the basis for that suspension and if, in fact, it is a termination rather than a suspension.

We demand that she be immediately returned to work with full payment of all wages and benefits she lost.

If we are in disagreement please refer to Section 18.2 of the Agreement and be advised we are prepared to meet within the time limits specified therein.

This Local Union reserves the right to set forth any additional facts and Contract provisions we may determine to be necessary or appropriate to the final disposition of this grievance.

Very truly yours,

/s/ Doris E. Lowe
Secretary-Treasurer

DEL:sc
opeu 29
afl-cio

cc: PETE ROCKWELL
KAREN LIVADAS

MOTION FILED
APR - 6 1994

No. 92-1920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KAREN LIVADAS,
Petitioner,

vs.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR
THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT OUT OF TIME

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT OUT OF TIME

Amicus Curiae Food Employers Council, Inc., by its counsel, moves this Court for an Order Granting Leave to File

the *Amicus Curiae* Brief lodged with the Court on April 5, 1994, out of time.

The grounds for this Motion are as follows:

1. Counsel for *Amicus Curiae* made contact with Lawyers Brief Service in Los Angeles concerning printing and filing of the *Amicus Curiae* Brief on or about March 11, 1994, counsel specifying at the time that the printed brief needed to be filed with this Court by April 1, 1994, counsel having been advised by the California Labor Commissioner that Respondent's Brief was due on that date.

2. Counsel was advised by representative of Lawyers Brief Service that the amicus curiae brief could be printed and filed with this Court within three days of delivery of the typewritten brief to their offices in Los Angeles.

3. The typewritten brief was delivered to Lawyers Brief Service by counsel on March 24, 1994. The first proof copy of the printed brief was received on March 25, 1994. Counsel called in corrections to the proof copy on that same date. A second proof copy was received on March 28, 1994. Counsel made one small correction to the proof by telephone on that same date. Counsel was advised on that same date by a representative of Lawyers Brief Service that the forty printed copies of the brief would be timely filed. Lawyers Brief Service made service and placed filing copies in the U.S. Post Office on March 30, 1994 pursuant to Rule 29.2 and obtained a certificate of mailing from the post office.

4. On April 5, 1994 counsel was advised by telephone by the Clerk of this Court that the copies of the printed brief had just been received and could not be filed without an Order of the Court granting leave therefor. Counsel learned for the first time during this telephone conversation that the Court had issued a specific Order requiring receipt of all *amici* briefs in the Office of the Clerk by 3:00 p.m. on April 1, 1994. Counsel have never received a copy of this Order.

5. Counsel for this *amicus curiae* have done all in their power to ensure a timely filing of the printed brief. Leave is accordingly requested to file said brief out of time.

DATED: April 5, 1994

Respectfully Submitted,

Joseph M. McLaughlin

Joseph M. McLaughlin
Counsel of Record

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